TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 75

FORD MOTOR COMPANY, PETITIONER,

vs.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 3, 1944.

CERTIORARI GRANTED MAY 29, 1944.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No.

FORD MOTOR COMPANY,

Petitioner,

vs.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON AND FRANK G. THOMPSON, AS AND CONSTITUTING THE DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

TRANSCRIPT OF RECORD

In the
United States Circuit Court of Appeals
For the Seventh Circuit

No. 8417

FORD MOTOR COMPANY,

Plaintiff-Appellant,

vs.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON AND FRANK G. THOMPSON, AS AND CONSTITUTING THE DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,

Defendants-Appellees.

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

THE DUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

TRANSCRIPT OF RECORD FILED SEP. 25, 1943.
PRINTED RECORD.

In the
United States Circuit Court of Appeals
For the Seventh Circuit

No. 8417

FORD MOTOR COMPANY,

Plaintiff-Appellant,

vs.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON AND FRANK G. THOMPSON, AS AND CONSTITUTING THE DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,

Defendants-Appellees.

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

INDEX.

1 Pleas of the District Court of the United States for the Southern District of Indiana, at the United States Court House in the City of Indianapolis, in said District, before the Honorable Robert C. Baltzell, Judge of said District Court.

Ford Motor Company,
vs.
Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and constituting the Department of Treasury of the State of Indiana. } No. 117 Civil.

Be It Remembered that heretofore to wit: at the May Term of said Court, on the 7th day of June, 1939, Before the Honorable Robert C. Baltzell, Judge of said Court, the following proceedings in the above case were had, to wit:

Comes now the plaintiff by its attorneys and files complaint in the above entitled cause, which complaint is as follows:

2 IN THE DISTRICT COURT OF THE UNITED STATES.

For the Southern District of Indiana,

Indianapolis Division.

Ford Motor Company, *Plaintiff.*	
vs.	
Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and constituting the Department of Treasury of the State of Indiana, *Defendants.*	Civil Cause No. 117.

COMPLAINT.

(Filed June 7, 1939.)

Comes now the plaintiff and complains of the defendants, and for cause of action alleges that:

1. Jurisdiction is founded upon diversity of citizenship and amount. Plaintiff is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at Dearborn in the State of Michigan. Defendant, Department of Treasury of the State of Indiana, is an executive Department of the State of Indiana vested with the enforcement and application, through an administrative division known as the Gross Income Tax Division, of the Indiana Gross Income Tax Act of 1933 (Chapter 50, Acts of 1933), as amended by the Acts of 1937 (Chapter 117, Acts of 1937). Defendants, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, are each citizens and residents of the State of Indiana and of the County of Marion, and together constitute the Board of Department of Treasury of the State of Indiana. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

2. Jurisdiction is also founded on the existence of a federal question and amount in controversy. The tax sought to be recovered is alleged to have been illegally assessed under Article I, Section 8 of the Constitution of

3 the United States and Amendment 14 of the Constitution of the United States, and the matter in contro-

versy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3,000.00).

3. Plaintiff has been improperly charged with such tax under the terms and provisions of the Indiana Gross Income Tax Act of 1933, as amended, and has been required to pay the same. The amounts improperly charged were collected upon plaintiff's gross receipts from January 1, 1935 to April 15, 1939. The aforesaid amounts, together with the amounts of interest improperly collected thereon, are as follows, to-wit:

	1935	1936	1937	1938
Tax	$26,656.81	$21,980.93	$34,523.16	$7,371.15
Interest	10,854.72	5,848.17	3,734.11	294.85

	1939 (1st Quarter)	Total
Tax	$4,442.80	$ 94,974.85
Interest	66.64	20,798.49
		$115,773.34

The total tax and interest improperly collected from plaintiff during such period is One Hundred Fourteen Thousand Seven Hundred Forty-two Dollars and Eighty-six Cents ($114,742.86). Plaintiff within one year prior to the institution of this action had filed with the Department of Treasury petitions for refund in proper form, seeking to recover all of the foregoing tax and interest. Prior to the commencement of this action, the defendant, Department of Treasury, had denied said petitions for refund and had notified plaintiff thereof in writing. Defendants have refused to pay plaintiff said tax and interest improperly assessed against plaintiff and which plaintiff has been required to pay

4. The tax sought to be recovered by plaintiff in the aforesaid petition for refund was assessed on receipts of plaintiff from January 1, 1935 to April 15, 1939 arising from the following course of business pursued during that period:

(a) Plaintiff is engaged in the business of manufacturing and selling automobiles, trucks and parts. Its principal manufacturing establishment, home office and principal place of business is located at Dearborn, in the State of Michigan. Plaintiff does not maintain within the State of Indiana any establishment or factory at which its prod-

ucts are manufactured or assembled, but all of the products distributed in Indiana are either manufactured and assembled at Dearborn, Michigan, or assembled at branches of the plaintiff at Chicago, Illinois, Cincinnati, Ohio and Louisville, Kentucky. All of the products of plaintiff are sold to the ultimate consumers by independent dealers who have contracts with plaintiff, which were executed subject to the approval of plaintiff's Dearborn office, and such dealers by such contracts are assigned to place their orders with, make remittances to, and receive service from, a certain designated branch of plaintiff which has the territory in which the dealer is located. Plaintiff maintains at Indianapolis, Indiana, a branch through which contacts are made and service rendered to dealers located in a certain territory hereinafter described that is served out of such branch. All of the dealers in the State of Indiana are assigned to plaintiff's branches at either Indianapolis, Indiana, Chicago, Illinois, Cincinnati, Ohio, or Louisville, Kentucky.

(b) The branches with which the dealers are connected were established and have since been maintained because of geographical and business advantages that make the service of dealers in the established territory more advantageous to the plaintiff from the standpoint of cost and of facility of service. The territory in Indiana in which the dealers located therein have contracts with the branch at Chicago, Illinois, comprise the counties of Lake, Porter, Laporte, St. Joseph, Elkhart, Kosciusko, Marshall and Starke. The territory in Indiana in which the dealers located therein have contracts with the branch at Cincinnati, Ohio, comprise the counties of Franklin, Ripley, Dearborn, Ohio and Switzerland. The territory in Indiana in which the dealers located therein have contracts with the branch at Louisville, Kentucky, comprise the counties of Warrick, Dubois, Orange, Washington, Jackson, Scott, Clark, Floyd, Harrison, Crawford, Perry and Spencer. All other dealers of the plaintiff in all other counties in the State of Indiana are dealers of the Indianapolis, Indiana, branch. Also the dealers in Douglas, Edgar, Coles, Clarke, Cumberland, Jasper, Crawford and Lawrence counties in the State of Illinois are dealers of the Indianapolis branch. The branches at Chicago, Cincinnati and Louisville also have dealers in territory outside of the State of Indiana. The allocations of dealers

to the respective branches of the plaintiff above described at Chicago, Cincinnati, Louisville and Indianapolis were made long prior to the enactment of the Indiana Gross Income Tax Act of 1933, and have been continued without change since the enactment of that Act. Plaintiff's dealers served by the branches at Chicago, Cincinnati, Louisville and Indianapolis on the execution of their original contracts with the plaintiff, make all their contacts with, and by their contracts are designated as, dealers of the respective branch in whose territory they are located. Plaintiff does not have the facilities or employees in the State of Indiana to serve all of its Indiana dealers out of the Indianapolis branch. The method of sale and distribution of taxpayer's products in Indiana has been carried on in the same manner since the enactment of the Gross Income Tax Act of 1933, as was done prior to
6 that time, and no material change in the operation of plaintiff's method of doing business with respect to the sale and distribution of its products in the State of Indiana has been effected since the enactment of said Act, except as hereinafter stated.

(c) The following is the regular course of business: The dealers on or before the 10th of each month file with their branch an order form stating the quantity and type of cars and trucks desired for the next succeeding month or otherwise advise the branch of their requirements. The respective branches assemble and tabulate this data, and on or before the 14th of each month advise plaintiff's Dearborn office of the estimate of the requirements of the entire branch territory as to number and type of cars and trucks desired for the succeeding month by the branch, and requesting in those cases, such as Indianapolis, where no cars or trucks are assembled, the points from which it is desired that the cars and trucks be shipped. On the basis of these reports, which are received at Dearborn, Michigan, from all of plaintiff's branches, production schedules for the next month are made up, and on or about the 23rd of each month, plaintiff advises each of its branches of the cars and trucks allocated to each branch and the point from which shipment of those cars and trucks will be made in the event the branch is not an assembly point. The allotment may be increased or decreased over the branch's request, depending upon production schedules established. Thereafter the branch establishes daily de-

livery schedules to its various dealers on the basis of the allotment. The delivery of cars and trucks to the various dealers in Indiana is accomplished by independent "truck-away" companies that transport the cars and trucks from either the plaintiff's manufacturing establishment at Dearborn or from the assembly branches at Chicago, Cincinnati and Louisville, or as stated in paragraphs 4(e) and
7 4(f) infra. All of the cars and trucks delivered are delivered C. O. D. to the dealers, and the truck-away company delivering the products collects from the dealer either checks, cash or securities representing the payment for the products, and remits the same directly to the branch that has the territory in which the dealer is located, regardless of the point of origin of the cars and trucks. The branch upon the receipt of the remittances, immediately deposits them in a special account in a bank in the City where the branch is located which account is subject only to the control of plaintiff's Dearborn office, and advises Dearborn of the deposit. By bank credits and charges the remittances then are placed in Dearborn, New York, Chicago, Detroit or other banks of the plaintiff. All of the gross receipts for trucks or cars delivered to dealers in Indiana of the Chicago, Cincinnati and Louisville branches are received in those respective cities, and none of the gross receipts for such products is ever received by the plaintiff in the State of Indiana or deposited in any bank or trust company in the State of Indiana, but such income and proceeds are received by plaintiff entirely in the respective States of Illinois, Ohio and Kentucky.

(d) All of the dealers of the plaintiff in Indiana have knowledge of the fact that plaintiff has no manufacturing establishment or assembly plant in the State of Indiana, and in placing their orders for cars or trucks contemplate that the cars or trucks will be shipped to them from some point outside of the State of Indiana, which in the case of dealers of the respective out-state branches is generally from such out-state branch, but which in the case of Indianapolis dealers is either from Dearborn or from Chicago, Illinois, Cincinnati, Ohio or Louisville, Kentucky, depending upon the established production schedules.

(e) Occasionally, depending upon the demand for cars and the production schedule of the plaintiff, the supply of cars and trucks will exceed the demands of dealers, and
8 at such time a stock of cars and trucks is shipped to and accumulated at the Indianapolis branch. Dur-

ing and after such short periods of accumulation of cars and trucks at the Indianapolis branch, dealers of the Indianapolis branch are supplied cars and trucks from such Indianapolis branch by the truck-away process above described. The Indiana gross income tax has been paid upon all gross receipts of the plaintiff from all trucks or cars which are so delivered out of the Indianapolis branch to dealers in Indiana after having come to rest at that branch, and no part of the tax sought to be recovered in this case arises from receipts from such source.

(f) In many instances, customers of the dealers in Indiana or the Indiana dealers will go to one of the out-state branches of the plaintiff and there "pick up" cars or trucks. In the cases of customers, such customer selects and accepts delivery of his car or truck at such out-state branch. Likewise a dealer accepts delivery and there pays for the car or truck. The receipts from such deliveries have been included in the receipts assessed as taxable under the Indiana Gross Income Tax Act and are sought to be recovered herein.

(g) In general, the outline of the method of business hereinbefore described applies also to parts manufactured by the Company, and part of the tax sought to be recovered in this case arises upon the gross receipts from parts.

5. (a) During the period from January 1, 1935 to December 31, 1937, the plaintiff has received gross receipts from the sale of cars, trucks and parts to dealers in Indiana of its Chicago, Illinois, Cincinnati, Ohio and Louisville, Kentucky, branches from business conducted in the manner alleged in paragraph 4 of this complaint, upon which an additional tax with interest has been assessed as follows:

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	1935	1936	1937	Total
Tax	$26,656.81	$19,901.31	$13,173.18	$59,731.30
Interest	10,854.72	5,591.95	2,336.13	18,782.80
				$78,514.10

Plaintiff alleges that the gross receipts upon which the aforesaid tax was predicated are gross receipts derived from business conducted in commerce between states of the United States, and that such receipts under the terms and provisions of Section 6(a) of the Gross Income Tax Act of 1933, and as amended in 1937, are exempt from taxa-

tion by the defendants, Plaintiff further alleges that if said Gross Income Tax Act, when construed according to its true intent, imposes a tax on the gross receipts of plaintiff derived from its business conducted as set forth in paragraph 4 of this complaint on the receipts from the source above stated, then said Act is invalid and void for the reason that such tax constitutes a regulation of and a burden upon interstate commerce and is in violation of Section 8, Article I of the Constitution of the United States. For the foregoing reasons, the plaintiff is entitled to a refund of the tax so assessed and collected upon its gross receipts from the above source.

Plaintiff alleges that the gross receipts upon which the aforesaid tax was predicated are gross receipts derived from activities, business and sources outside of the State of Indiana under the provisions of Section 2 of the Gross Income Tax Act of 1933 and as amended in 1937, and are exempt from taxation by the defendants. Plaintiff further alleges that if said Gross Income Tax Act, when construed according to its true intent, imposes a tax upon the gross receipts of the plaintiff derived from its business conducted as set forth in paragraph 4 of this complaint on receipts from the source above stated and received outside of the State of Indiana, then said Act is invalid and void for the reason that the State of Indiana has no jurisdiction to impose a tax upon such gross receipts, and the levy of such tax is lacking in due process of law and is in violation of Amendment Fourteen of the Constitution of the United States. For the foregoing reasons, the plaintiff is entitled to a refund of the tax so assessed and collected upon its gross receipts from the above source.

(b) During the period from January 1, 1936 to April 15, 1939, the plaintiff has received gross receipts from the sale of cars, trucks and parts to dealers in Indiana of its Indianapolis branch from business conducted in the manner alleged in paragraph 4 of this complaint where such cars, trucks and parts were delivered directly to the dealers from either Dearborn, Michigan, Chicago, Illinois, Concinnati, Ohio or Louisville, Kentucky, upon which an additional tax with interest has been assessed as follows:

	1936	1937	1938	1939 (1st Quarter)	Total
Tax	$2,079.62	$21,349.98	$7,371.15	$4,442.80	$35,243.55
Interest	256.22	1,397.98	294.85	66.64	2,015.69
					$37,259.24

Plaintiff alleges that the gross receipts upon which the aforesaid tax was predicated are gross receipts derived from business conducted in commerce between states of the United States, and that such receipts under the terms and provisions of Section 6(a) of the Gross Income Tax Act of 1933, and as amended in 1937, are exempt from taxation by the defendant. Plaintiff further alleges that if said Gross Income Tax Act, when construed according to its true intent, imposes a tax on the gross receipts of Plaintiff derived from its business conducted as set forth in paragraph 4 of this complaint on the receipts from the source above stated, then said Act is invalid and void for the reason that such tax constitutes a regulation of and a burden upon interstate commerce and is in violation of Section 8, Article I of the Constitution of the United
11 States. For the foregoing reasons, the plaintiff is entitled to a refund of the tax so assessed and collected upon its gross receipts from the above source.

(c) During the period from January 1, 1935 to December 31, 1937, the plaintiff has received gross receipts from the sale of cars and trucks to dealers in Indiana where customers of such dealers or the dealers traveled to plaintiff's place of business at Dearborn, Michigan or its branches at Chicago, Illinois, Cincinnati, Ohio and Louisville, Kentucky, and there selected and accepted delivery of such cars or trucks, and settlement by such dealer was made at the time of the acceptance of such delivery in such other State, all as more specifically alleged in paragraph 4 of this complaint, and upon which an additional tax with interest has been assessed as follows:

	1935	1936	1937	Total
Tax	$1,179.55	$1,174.13	$1,248.99	$3,602.67

Plaintiff alleges that the gross receipts upon which the aforesaid tax was predicated are gross receipts derived from activities, business and sources outside of the State of Indiana under the provisions of Section 2 of the Gross Income Tax Act of 1933 and as amended in 1937, and are exempt from taxation by the defendants. Plaintiff further alleges that if said Gross Income Tax Act, when construed according to its true intent, imposes a tax upon the gross receipts of the plaintiff derived from its business conducted as set forth in paragraph 4 of this complaint on receipts from the source above stated and received outside of the

State of Indiana, then said Act is invalid and void for the reason that the State of Indiana has no jurisdiction to impose a tax upon such gross receipts, and the levy of such tax is lacking in due process of law and is in violation of Amendment Fourteen of the Constitution of the United States. Plaintiff alleges that the gross receipts upon which the aforesaid tax was predicated are gross receipts derived from business conducted in commerce between
12 states of the United States, and that such receipts under the terms and provisions of Section 6(a) of the Gross Income Tax Act of 1933, and as amended in 1937, are exempt from taxation by the defendant. Plaintiff further alleges that if said Gross Income Tax Act, when construed according to its true intent, imposes a tax on the gross receipts of plaintiff derived from its business conducted as set forth in paragraph 4 of this complaint on the receipts from the source above stated, then said Act is invalid and void for the reason that such tax constitutes a regulation of and a burden upon interstate commerce and is in violation of Section 8, Article I of the Constitution of the United States. For the foregoing reasons, the plaintiff is entitled to a refund of the tax so assessed and collected upon its gross receipts from the above source.

(d) All of plaintiff's gross receipts from all sources described in paragraph 4 of this complaint which were received by the plaintiff from January 1, 1935 to September 30, 1936 accrued, were reported and became taxable under the Gross Income Tax Act of 1933, as the same existed prior to its amendment in 1937, which amendment became effective on April 1, 1937. Plaintiff alleges that the defendants were without right and authority under the provisions of the Gross Income Tax Act of 1933 to assess any portion of the gross receipts of the plaintiff accruing during the aforesaid period with an additional tax for the reason that the defendants did not at any time within two years after the time when the return covering such gross income tax was filed give due notice by registered mail to the plaintiff of such assessment. On the contrary, plaintiff alleges that the notice given by registered mail of the additional assessment against the plaintiff was not given until the 7th day of January, 1939, which time was more than two years after the time when the quarterly and annual returns covering the plaintiff's gross receipts
13 from January 1, 1935 to September 30, 1936 were filed. Plaintiff further alleges that so much of the assessment

as is predicated upon the receipts during such period is invalid and void for the reason that it is lacking in due process of law under the Fourteenth Amendment to the Constitution of the United States. For the foregoing reasons, the plaintiff is entitled to a refund of the tax so assessed and collected upon its receipts during such period.

Wherefore the plaintiff prays a refund of the tax and interest assessed and collected from it in the amount of One Hundred Fifteen Thousand Seven Hundred Seventy Three Dollars and Thirty Four Cents ($115,773.34), together with interest thereon from the date of payment, and for all other proper relief in the premises.

/s/ Frederick E. Matson,
/s/ Harry T. Ice,
/s/ Louis J. Colombo,
Attorneys for Plaintiff.

Louis J. Colombo,
Detroit, Michigan,
Matson, Ross, McCord & Clifford,
Indianapolis, Indiana,
Of Counsel.

14 (Entry for June 7, 1939, continued.)

And thereupon, there was issued out of the office of the Clerk of this Court a writ of summons for the defendants to the United States Marshal.

15 And afterwards, to wit, at the May Term of said Court on the 27th day of June, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Come now the defendants by their attorneys and file answer, which is as follows:

16 In the District Court of the United States.

* * (Caption—117) * *

ANSWER.

Come now the defendants, Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and constituting the

Department of Treasury of the State of Indiana, and for answer to the plaintiff's complaint herein state:

1. The defendants admit so much of the paragraph designated as "1" of the plaintiff's complaint as alleges that the jurisdiction is founded upon diversity of citizenship and amount, and that the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business at Dearborn, in the State of Michigan, and that the defendant, Department of Treasury of the State of Indiana, is an executive department of the State of Indiana vested with the enforcement, through an administrative division known as the Gross Income Tax Division, of the Indiana Gross Income Tax Act of 1933 (Chapter 50 of the Acts of 1933), as amended by the Acts of 1937. (Chapter 117, Acts of 1937), and the defendants, M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson are each citizens and residents of the State of Indiana and of the County of Marion, and that together they constitute the Board of Department of Treasury of the State of Indiana. The defendants further admit that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00), being in the amount of One Hundred Fourteen Thousand Seven Hundred Forty Two Dollars and eighty-six cents ($114,742.86).

2. The defendants admit so much of the paragraph of the plaintiff's complaint designated as "2" as alleges that the jurisdiction is founded on the existence of an alleged federal question, and amount in controversy, but the defendants deny that the tax sought to be recovered was illegally assessed under Article I, Section 8 of the Constitution of the United States. The defendants further admit that the amount in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3,000.00), being in the amount of One Hundred Fourteen Thousand Seven Hundred Forty Two Dollars and eighty six cents ($114,742.86).

3. The defendants deny that the plaintiff has been improperly charged with the taxes reflected in the plaintiff's complaint under the terms and provisions of the Indiana Gross Income Tax Act of 1933, as amended, but admits that the plaintiff has been required to pay the same. The defendants admit so much of the paragraph designated as "3" of the plaintiff's complaint as alleges that the amounts

in controversy were taxes measured by the plaintiff's
18 gross receipts between the dates of January 1, 1935, and March 31, 1939, and that the aforesaid amounts, together with the amounts of interest collected thereon, are as follows, to-wit:

	1935	1936	1937	1938
Tax	$26,383.62	$21,321.67	$54,425.13	$7,371.15
Interest	10,854.72	5,848.17	3,734.11	294.85

	1939 (1st Quarter)	Total
Tax	$4,442.80	$93,944.37
Interest	66.64	20,798.49
		$114,742.86

The defendants further admit so much of the paragraph as alleges that the total tax and interest collected from the plaintiff, measured by receipts received during the period of January 1, 1935, to March 31, 1939, was in the sum of One Hundred Fourteen Thousand Seven Hundred Forty Two Dollars and eighty six cents ($114,742.86), and that the plaintiff within one year prior to the institution of this action had filed with the Department of Treasury petitions for refund in proper form, seeking to recover all of the foregoing tax and interest, and that prior to the commencement of this action the defendant Department of Treasury had denied said petitions for refund and had notified the plaintiff of such denial in writing. The defendants further admit that the defendants have refused to pay the plaintiff said tax and interest.

4. The defendants admit so much of the paragraph designated as "4" of the plaintiff's complaint as alleges that the tax sought to be recovered by the plaintiff in the petitions for refund mentioned in the paragraph immediately above, was measured by receipts of the plaintiff in the period commencing January 1, 1935, to and including March 31, 1939.

19 (a) The defendants admit so much of the subparagraph designated as "(a)" of the paragraph designated "4" of the plaintiff's complaint as alleges that the plaintiff is engaged in the business of manufacturing and selling automobiles, trucks, and parts, and that the plaintiff's principal manufacturing establishment and principal place of business is located at Dearborn, in the State of Michigan, but the defendants have no knowledge that

the home office of the plaintiff, which is a corporation organized and existing under the laws of the State of Delaware, is located at Dearborn, in the State of Michigan. The defendants, further answering sub-paragraph (a), say that they admit so much thereof as alleges that the plaintiff does not maintain within the State of Indiana any establishment or factory at which its products are manufactured, and the defendants admit that during the period of January 1, 1935, to March 31, 1939, the plaintiff did not maintain within the State of Indiana any establishment or factory at which its products were actually assembled, but the defendants assert that the plaintiff did maintain within the State of Indiana, and at Indianapolis, in Marion County, Indiana, an establishment at which its products could have been assembled and in which the plaintiff maintained facilities for assembling its products; the defendants, further answering the complaint, admit that all of the products distributed in Indiana between January 1, 1935, and March 31, 1939, were either manufactured and assembled at Dearborn, Michigan, or were actually assembled at branches of the plaintiff maintained at Chicago, Illinois, Cincinnati, Ohio, and Louisville, Kentucky. The defendants further admit that all of the products of the plaintiff were sold to the ultimate consumers thereof by independent dealers who have contracts with the plaintiff, which contracts were executed subject to the approval of the plaintiff's Dearborn, Michigan, office, but the defendants deny that such dealers by such contracts are assigned or required to place their orders with, and to make remittances to and receive service from, a certain designated assembly branch of the plaintiff. The defendants, further answering the complaint, admit that the plaintiff maintains at Indianapolis, Marion County, Indiana, a branch through which contracts are negotiated and from which deliveries of the plaintiff's products are made and from which service is rendered to dealers located in a certain territory, but the defendants deny that such contracts are made at Indianapolis, Indiana, and allege that such contracts which were negotiated for were subject to the approval by the plaintiff at the plaintiff's Dearborn, Michigan, office. The defendants further admit that all of the dealers in the State of Indiana are assigned by the plaintiff to the plaintiff's branches at either Indianapolis, Indiana, or Chicago, Illinois, or Cincinnati, Ohio, or Louisville,

Kentucky, but that such assignments are made by the plaintiff and are not made by the dealers.

(b) The defendants, further answering the complaint, say that with respect to the allegation contained in "(b)", "the branches with which the dealers are connected were established and have since been maintained because of geographical and business advantages that make the service of dealers in the established territory more advantageous to the plaintiff from the standpoint of cost and of facility of service", the defendants have no knowledge of the truth or falsity of such statement. The defendants, further answering the complaint, deny that dealers located in Indiana "have contracts With" the branch at Chi-
21 cago, Illinois, or "have contracts with" the branch at Cincinnati, Ohio, or "have contracts with" the branch at Louisville, Kentucky, but the defendants admit that dealers located in the Counties of Lake, Porter, LaPorte, St. Joseph, Elkhart, Kosciusko, Marshall and Starke have been assigned by the plaintiff to the plaintiff's branch at Chicago, Illinois; and the defendants admit that the counties of Warrick, Dubois, Orange, Washington, Jackson, Scott, Clark, Floyd, Harrison, Crawford, Perry and Spencer have been assigned by the plaintiff to the plaintiff's branch at Louisville, Kentucky; and that the dealers of the plaintiff located in Franklin, Ripley, Dearborn, Ohio, and Switzerland Counties have been assigned by the plaintiff to the plaintiff's branch located at Cincinnati, Ohio; and that all of the other dealers of the plaintiff in all of the other counties of the State of Indiana have been assigned by the plaintiff to the plaintiff's Indianapolis, Indiana, branch. The defendants further admit that the plaintiff's dealers located in Douglas, Edgar, Coles, Clark, Cumberland, Jasper, Crawford and Lawrence Counties in the State of Illinois have been assigned by the plaintiff to the plaintiff's branch located at Indianapolis, Indiana, and further that the plaintiff's branches at Chicago, Illinois, at Cincinnati, Ohio, and at Louisville, Kentucky, have assigned to their care dealers in territory located outside of the State of Indiana. The defendants, further answering the complaint, admit that the schedule of counties by which the allocation of dealers to certain respective branches of the plaintiff, above described, were schedules which were made by the plaintiff prior to the enactment of the Indiana Gross Income Tax Act of 1933, and that said

schedules have been continued without change since the enactment of that Act, but the defendants allege that
22 the allocation of certain specific dealers by the plaintiff to certain of its branches has been made subsequent to the enactment of the Indiana Gross Income Tax Act and that, in the transaction of its business, the plaintiff has delivered its products to its dealers located in Indiana in a manner which did not give effect to the allocation or the schedule hereinabove set forth. The defendants, further answering the complaint, admit that the plaintiff's dealers who had been assigned by the plaintiff to the plaintiff's branches located at Cincinnati, Chicago, Louisville, and Indianapolis, in many instances negotiated their original contracts with the plaintiff through the branches located at Chicago, Cincinnati, Louisville, and Indianapolis, but the defendants allege that such contracts were executed subject to the approval of the plaintiff's Dearborn, Michigan, office, and the defendants deny that such dealers "by their contracts are designated as, dealers of the respective branch in whose territory they are located"; the defendants admit that the plaintiff's dealers, after having executed contracts with the plaintiff, make their contacts with the branch to which the plaintiff assigns them, but the defendants allege that such assignments are made by the plaintiff and that such assignments are not controlled by such dealers. The defendants, further answering the complaint, state that they the defendants have no knowledge with respect to the following allegation: "Plaintiff does not have the facilities or employees in the State of Indiana to serve all of its Indiana dealers out of the Indianapolis branch"; but the defendants allege that the plaintiff has the facilities at its Indianapolis, Indiana, branch to assemble its products, and has facilities at Indianapolis, Indiana to supply such products from the warehouse stores kept
23 there to supply products to dealers within the State of Indiana. The defendants have no knowledge with respect to the truth or falsity of the following statement: "The method of sale and distribution of taxpayer's products in Indiana has been carried on in the same manner since the enactment of the Gross Income Tax Act of 1933, as was done prior to that time, and no material change in the operation of plaintiff's method of doing business with respect to the sale and distribution of its products in the

State of Indiana has been effected since the enactment of said Act".

(c) The defendants admit so much of the paragraph designated as "4 (c)" of the plaintiff's complaint as alleges that the plaintiff's dealers on or before the tenth day of each month file with the branch of the plaintiff to which they have been assigned, an order form stating the quantity and type of cars and trucks desired for the next succeeding month or otherwise advise the branch of their requirements, but the defendants deny that such notification constitutes an order, and the defendants allege that the information contained on such notification is merely an estimate. The defendants admit that the respective branches assemble and tabulate data received from the dealers of the plaintiff, and that on or about the fourteenth day of each month advise the plaintiff's Dearborn, Michigan, office of the estimates of the requirements of the entire branch territory as to number and type of cars, trucks, and parts desired for the succeeding months by the branch; but the defendants have no knowledge that the plaintiff's branch offices in those cases where no trucks or cars are actually assembled because of the plaintiff's decision not to assemble such products at such points, specifically request the points from which it is desired that the cars, 24 trucks, or parts be shipped, and the defendants have no knowledge that in each individual instance, if such specific affirmative requests are made, the plaintiff complies with them; and the defendants have no knowledge as to the truth or falsity of the allegation: "On the basis of these reports, which are received at Dearborn, Michigan, from all of plaintiff's branches, production schedules for the next month are made up, and on or about the twenty-third of each month, plaintiff advises each of its branches of the cars and trucks allocated to each branch and the point from which shipment of these products will be made in the event the branch is not an assembly point", or the allegation: "The allotment may be increased or decreased over the branch's request, depending upon production schedules established", but the defendants allege that if such allegation is true, the point from which shipment is to be made and the allotment which is increased or decreased is at the option of the plaintiff. The defendants, further answering the complaint, admit that "thereafter the branch

establishes daily delivery schedules to its various dealers on the basis of the allotment", but the defendants allege that in some instances the plaintiff has delivered or caused delivery to be made to certain of its various dealers without having received from such dealers specific orders covering the cars, trucks, and parts delivered; and the defendants further admit that the delivery of cars and trucks to the various dealers in Indiana is accomplished by 'truck-away' companies that transport the cars and trucks from either the plaintiff's manufacturing establishment at Dearborn, Michigan, or from the assembly branches at Chicago, Illinois, Cincinnati, Ohio, or Louisville, Kentucky, or from the warehouse in which the plaintiff stores such property at Indianapolis, Indiana, but the defendants have no knowledge of the truth or falsity of the allegation in the plaintiff's complaint that such "truck-away" companies are "independent"; and the defendants further admit that all of the cars and trucks delivered are delivered C. O. D. to the dealers, and the truck-away company delivering the products act as the agent of the plaintiff in collecting from the dealer either checks, cash, or securities representing the payment for the products at the time of delivery, and that the truck-away company acting as the agent of the plaintiff remits such payment directly to the branch to which the dealer has been assigned by the plaintiff, regardless of the point of origin of the property delivered, and that the plaintiff's branch, upon the receipt of the remittances from the collecting agent, immediately deposit such remittances or payments in a special account in a bank in the city where the branch is located, which account is subject only to the control of the plaintiff's Dearborn office, and advises the plaintiff's office at Dearborn, Michigan, of the fact that the branch has made such deposit in the city in which it is located; it is further admitted that by bank credits and charges the remittances then are placed in Dearborn, Michigan, New York City, New York, Chicago, Illinois, or Detroit, Michigan, banks, and credited to the plaintiff; but the defendants deny that all of the gross receipts for trucks or cars or parts delivered to dealers in Indiana, which dealers had been assigned by the plaintiff to the Chicago, Illinois, or the Cincinnati, Ohio, or the Louisville branches of the plaintiff, were received in those respective cities, and that none of the gross receipts for

such products was ever received by the plaintiff in the
26 State of Indiana or deposited in any bank or trust company in the State of Indiana, and the defendants allege that all of the gross receipts of the plaintiff received as payment for trucks, cars, or parts, delivered by the plaintiff to dealers in Indiana, were received by the truck-away company acting as an agent and for and on behalf of the plaintiff at the dealer's place of business within the State of Indiana; further, the defendants have no knowledge that the gross receipts of the plaintiff derived as payment for trucks and cars delivered to dealers in Indiana were not deposited in any bank or trust company in the State of Indiana, or that such income and proceeds were received by the plaintiff in the States of Illinois, Ohio, and Kentucky.

(d) The defendants, further answering the plaintiff's complaint, and specifically that part designated as "4(d)", admit that the dealers of the plaintiff in Indiana may have knowledge of the fact that the plaintiff has no manufacturing establishment located within the State of Indiana, but the defendants deny that the dealers of the plaintiff in Indiana "have knowledge of the fact that the plaintiff has no * * * assembly plant in the State of Indiana", and the defendants allege that the plaintiff does have an assembly plant located in the State of Indiana at Indianapolis, Marion County, Indiana. The defendants have no knowledge that "in placing their orders for cars or trucks" the dealers of the plaintiff in Indiana "contemplate that the cars or trucks will be shipped to them from some point outside of the State of Indiana", and the defendants further deny that the dealers of the plaintiff in Indiana whose accounts have been assigned by the plaintiff to its Indianapolis, Indiana branch, contemplate that the cars or trucks will be shipped to them from either Dearborn, Michigan, or from Chicago, Illinois, or Cincinnati, Ohio, or Louis-
27 ville, Kentucky, and the defendants allege that such dealers generally receive delivery, or could receive delivery, from the stocks of property maintained by the plaintiff at its Indianapolis, Indiana, warehouse and branch.

(e) The defendants, further answering the plaintiff's complaint and specifically that part designated "4(e)", admit that a stock of cars, trucks, and parts was shipped to and accumulated at the Indianapolis, Indiana, branch of the plaintiff, and that during and after such accumulation

of property at the Indianapolis branch, dealers who had been assigned by the plaintiff to its Indianapolis branch were supplied with property from such stock stored at the Indianapolis branch, and that other dealers, both within the State of Indiana and outside of the State of Indiana, were supplied with cars, trucks, and parts from the accumulation of such property at the Indianapolis warehouse or branch, but the defendants respectfully deny that it was only "Occasionally" that the plaintiff maintained such property at its Indianapolis warehouse or branch, and the defendants deny that shipments were made from the stock of property so warehoused at the Indianapolis warehouse branch only during or in "short periods". The defendants further allege that during the time that the plaintiff maintained cars, trucks, and parts at its Indianapolis, Indiana, warehouse or branch, the plaintiff caused delivery of cars, trucks, or parts identical with those warehoused at Indianapolis to be delivered to dealers located within the State of Indiana. The defendants admit that the gross income tax measured by the gross receipts derived by the plaintiff
28 from the sale of trucks, cars, and parts which were delivered out of the Indianapolis branch to dealers in Indiana has been paid and that no part of the tax sought to be recovered in this case was measured by the gross receipts derived from such source within the State of Indiana.

(f) The defendants, further answering the plaintiff's complaint and particularly that part designated as "4(f)", admit that in some instances customers of the dealers of the plaintiff in Indiana, or the Indiana dealers of the plaintiff, would travel to one of the plaintiff's branches located at points outside of the State of Indiana and there "pick up" cars or trucks, and that in the case of customers of dealers of the plaintiff, such customer accepts delivery of his car or truck at such out-of-the-State of Indiana branch of the plaintiff, and that likewise Indiana dealers of the plaintiff who travel to branches maintained by the plaintiff at points outside of the State of Indiana in certain instances accept the delivery at such out-state branch of the plaintiff and there paid for the car or truck, but the defendants do not have knowledge of the specific number of such instances nor of the total gross receipts received by the plaintiff as payment for its cars, trucks, or parts in such instances; and the defendants deny that the

receipt from the deliveries described immediately above have been included in the receipts utilized as a measure for making the assessment under the Indiana Gross Income Tax Act of the taxes which are here sought to be recovered by the plaintiff.

(g) The defendants, further answering the complaint, admit that in general the outline of the method of business hereinabove described in this answer applies also
29 to the parts manufactured by the plaintiff, and the defendant admits that a part of the tax sought to be recovered in this case was measured by the gross receipts received by the plaintiff from the sale of parts manufactured by it.

5 (a). The defendants admit so much of the paragraph of the plaintiff's complaint designated as "5(a)" as alleges that during the period from January 1, 1935, to December 31, 1937, the plaintiff received gross receipts from the sale of cars, trucks, and parts to dealers located within the State of Indiana where such payments or gross receipts and business was allocated by the plaintiff to its Chicago, Illinois, or Cincinnati, Ohio, or Louisville, Kentucky branches, upon which the additional tax with interest has been assessed as follows:

	1935	1936	1937	Total
Tax	$26,656.81	$19,901.31	$13,173.18	$59,731.30
Interest	10,854.72	5,591.95	2,336.13	18,782.80
				$78,514.10

The defendants deny that the gross receipts which form the measure of the aforesaid tax were gross receipts derived from business or commerce conducted between states of the United States, and the defendants deny that such receipts were excepted by the terms and provisions of Section 6 (a) of the Gross Income Tax Act of 1933, and as amended in 1937, and hence that the plaintiff is entitled to any exemption thereby. The defendants further deny that the use of the gross receipts as aforesaid, which were derived from engaging in business in the State of Indiana and from a source within Indiana, is invalid and void by reason of the fact that the tax measured thereby con-
30 stitute a regulation of and a prohibited burden upon commerce between the states of the United States and, as such, is a violation of Section 8 of Article I of the Con-

stitution of the United States; and the defendants deny that the plaintiff is entitled to a refund of the tax assessed and collected by virtue of the business conducted within the State of Indiana by the plaintiff and by virtue of the gross income derived from sources within the State of Indiana measured by the gross income or gross receipts as aforesaid.

The defendants, further answering the plaintiff's complaint, deny that the gross receipts by which the aforesaid tax was measured were gross receipts derived from activities, businesses, and sources outside of the State of Indiana under the provisions of Section 2 of the Gross Income Tax Act of 1933, and as such Act was amended in 1937, and entitle plaintiff to exemption; the defendants further deny that the gross receipts used as a measure for the tax imposed upon the plaintiff by virtue of the business conducted within the State of Indiana and upon the basis of the gross income derived from sources within the State of Indiana, were received outside of the territorial boundaries of the State of Indiana; and the defendants further deny that the Gross Income Tax Act is invalid and void for the reason that the State of Indiana has no jurisdiction to impose a tax upon such gross receipts and that such a tax is lacking in due process of law and is in violation of Amendment 14 of the Constitution of the United States of America; and the defendants allege that the business done by the plaintiff within the State of Indiana and the source of the gross income utilized as a measure of the tax was within the taxing jurisdiction of the State of Indiana,

31 and that the receipt of the gross income used as a measure in determining the amount of tax was received within the State of Indiana, and the defendants further allege that the Gross Income Tax Act, and its application to the plaintiff during the period covered by this cause of action, is not invalid and is not void for the reason that the State of Indiana had no jurisdiction to impose the tax and that the tax was not in violation of the Fourteenth Amendment of the Constitution of the United States; and the defendants deny that the plaintiff is entitled to a refund of tax assessed and collected as above set forth.

(b) The defendants admit so much of the paragraph designated as "5(b)" of the plaintiff's complaint as alleges that during the period from January 1, 1936 to March 31, 1939, the plaintiff received as payment therefor gross

receipts from the sale of cars, trucks, and parts to dealers located in Indiana, which dealers had by the plaintiff been assigned to its Indianapolis, Indiana, warehouse and branch, where such cars, trucks, and parts were by the plaintiff delivered into the territory alleged by the plaintiff's complaint to have been allocated to the Indianapolis, Indiana, warehouse branch, directly to the dealers located in such territory allocated to the Indianapolis warehouse branch, from either Dearborn, Michigan, or Chicago, Illinois, or Cincinnati, Ohio, or Louisville, Kentucky, upon which additional tax with interest was assessed as follows:

	1936	1937	1938	1939 (1st Quarter)
Tax	$2,079.62	$21,349.98	$7,371.15	$4,442.80
Interest	256.22	1,397.98	294.85	66.64

	Total
Tax	$35,243.55
Interest	2,015.69
	$37,259.24

32 The defendants deny that the gross receipts used as a measure by which the tax levied upon business conducted within the State of Indiana were gross receipts derived from commerce conducted between separate states of the United States, and that such receipts were excepted under the terms and provisions of Section 6 (a) of the Gross Income Tax Act of 1933, and as amended in 1937, and that the plaintiff was entitled to an exemption thereby; the defendants further deny that the tax imposed and collected, measured by the gross receipts derived from sources within the State of Indiana as aforesaid, were invalid and void assessments, or that the said Gross Income Tax Act was invalid and void for the reason that such tax constitutes a prohibited regulation of, and a prohibited burden upon, commerce between the states in the constitutional sense so as to be a violation of Section 8, Article I of the Constitution of the United States of America; and the defendants further deny that the plaintiff is entitled to a refund of the tax so assessed and collected upon gross income derived from sources within the State of Indiana, which gross income was directly derived from engaging in business within the State of Indiana.

(c) The defendants admit so much of the paragraph designated as "5(c)" of the plaintiff's complaint as alleges

that during the period from January 1, 1935, to December 31, 1937, the plaintiff received gross receipts from the sale of cars and trucks to dealers in the State of Indiana where the customers of such dealers or the plaintiff's dealers traveled to the plaintiff's place of business at either Dearborn, Michigan, or to the branches of the plaintiff at Chicago, Illinois, or Cincinnati, Ohio, or Louisville,
33 Kentucky, and there cacepted delivery of cars and trucks, and payment by such dealer was made at the time of such delivery at the plaintiff's branch or place of business in such other state; but the defendants deny that additional tax with interest was assessed upon such transactions measured by such gross income and that the refund thereof was denied by the Department of Treasury of the State of Indiana.

(d) The defendants admit so much of the paragraph designated as "5(d)" of the plaintiff's complaint as alleges that the plaintiff's gross income received by the plaintiff for January 1, 1935, to September 30, 1936, accrued and were reported and became taxable under the provisions of the Gross Income Tax Act of 1933 as the same existed prior to its amendment in 1937, which amendment became effective on April 1, 1937; but the defendants deny that the State of Indiana acting through the defendants was without right and authority under the provisions of the Gross Income Tax Act as amended, to assess any portion of the gross receipts of the plaintiff accruing during the aforesaid period with an additional tax, for the reason that the defendants did not at any time within two years after the time when the return covering such gross income was filed, give notice by registered mail to the plaintiff of such assessment; the defendants admit so much of the paragraph designated as "5(d)" as alleges that the notice of proposed assessment given by registered mail of the additional assessment against the plaintiff was given on January 7, 1939, which date was more than two years after the time when the annual returns covering the plaintiff's gross receipts from January 1 to December 31,
34 1935, and from January 1 to December 31, 1936, were actually filed, the defendants respectfully represent that such assessments were made as specifically authorized by the Indiana Gross Income Tax Act as amended, and that the assessments were properly made under and and pursuant to the act in effect at the time that the assess-

ments were made by the Department of Treasury of the State of Indiana. The defendants deny that so much of the taxes assessed, measured by gross receipts derived by the plaintiff from sources within the State of Indiana during the period elapsed from January 1, 1935, to September 30, 1936, were or are invalid and void by virtue of any inhibition contained in the due process clause of the Fourteenth Amendment to the Constitution of the United States of America; and the defendants further deny that the plaintiff is entitled to a refund of the tax assessed and collected pursuant to the terms of the Gross Income Tax Act.

6. The defendants, as a further answer to the plaintiff's complaint, say that as to any allegation or averment, or any part thereof, contained in the said plaintiff's complaint not either admitted or denied heretofore in this Answer, the defendants now specifically deny each and every and all such allegations and averments, or parts thereof.

7. Wherefore, the defendants pray for judgment in their favor, for their costs, and for all other proper relief.

/s/ Omer Stokes Jackson,
Omer Stokes Jackson,
The Attorney General,
/s/ Joseph W. Hutchinson,
Joseph W. Hutchinson,
Deputy Attorney General,
/s/ Joseph P. McNamara,
Joseph P. McNamara,
Deputy Attorney General,
Attorneys for the Defendants.

219 Statehouse,
Indianapolis, Indiana.

35 And afterwards to wit at the November Term of said Court on the 12th day of December, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

This cause coming on for pre-trial conference and the parties being present by their respective attorneys, it is stipulated by the parties and it is ordered by the Court that this cause be continued until after decision in the following cases:

McGoldrick *vs.* Compagnie General Transatlantique Company, No. 44; and

McGoldrick *vs.* Felt & Tarrant Company, No. 45,

now pending before the Supreme Court of the United States.

36 And afterwards to wit at the May Term of said Court on the 27th day of October, 1941, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Come now the parties by their respective attorneys, and the plaintiff files motion for leave to file amendment of and supplement to complaint, which motion is as follows: (H. I.)

And the Court being duly advised grants such leave, and the plaintiff files amendment of and supplement to complaint, which is as follows:

37 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—117) * *

AMENDMENT OF AND SUPPLEMENT TO COMPLAINT.

(Filed Oct. 27, 1941.)

I—Amendment to Complaint.

Comes now the plaintiff, Ford Motor Company, and by way of amendment to its original complaint, and for a further and additional allegation in paragraph 4(c), on page

5, line 16, and immediately following the words "the cars and trucks.", and before the sentence beginning "The branch upon receipt of the remittances • • •", makes the following additional allegation:

"In many instances, the cars and trucks are partially or totally financed by the dealers with finance companies. In some instances, papers transferring title to the cars and trucks for the purpose of securing the loans of the finance companies are executed at the gate of the plaintiff's plants or branches at Chicago, Illinois, Cincinnati, Ohio, Louisville, Kentucky and Dearborn, Michigan by representatives of the truck-away-companies who have been given authority by such dealers to execute such finance and title papers. In some instances remittance is made directly by the finance companies for all or part of the purchase price so financed, such payment being made from the finance company's offices outside of the State of Indiana to the
38 branches of the plaintiff at Chicago, Illinois, Cincinnati, Ohio, Louisville, Kentucky and Dearborn, Michigan. The plaintiff looks to the truck-away-companies for all remittances, and said Companies are responsible for all collections and damage to or loss of cars or trucks in transit."

II—Supplemental Complaint.

Comes now the plaintiff, Ford Motor Company, and by way of supplement to its original complaint, and for a second, further and additional Paragraph of complaint alleges that:

Second Paragraph.

Comes now the plaintiff and complains of the defendant, and for a Second and further Paragraph of complaint alleges that:

1. Jurisdiction is founded upon diversity of citizenship and amount. Plaintiff is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at Dearborn in the State of Michigan. Defendant, Department of Treasury of the State of Indiana, is an executive Department of the State of Indiana vested with the enforcement and application, through an administration division known as the Gross Income Tax Division, of the Indiana Gross Income Tax Act

of 1933 (Chapter 50, Acts of 1933), as amended by the Acts of 1937 (Chapter 117, Acts of 1937). Defendants, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, were at the time of filing of the original complaint each citizens and residents of the State of Indiana and of the County of Marion, and together constituted the Board of Department of Treasury of the State of Indiana. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

2. At the proper time required by law, plaintiff had filed returns with the defendant, Department of Treasury, for the years 1935, 1936 and 1937 and paid all of the tax
39 for each such year as it in good faith deemed to be due on its gross receipts under the Indiana Gross Income Tax Act.

3. On the 17th day of January, 1939, plaintiff paid to the defendant, Department of Treasury, Eighty-one Thousand Fifty-eight Dollars and Five Cents ($81,058.05), which payment was made for additional tax and interest assessed against the plaintiff for the years 1935, 1936 and 1937. The aforesaid tax and interest paid by the plaintiff was based upon a notice of proposed assessment dated July 1, 1938 issued by the defendant, Department of Treasury, and supported by an audit which was attached as a part of the proposed assessment, and which set forth in detail the basis of the proposed additional tax. The major portion of said tax and interest was assessed on account of sales by plaintiff from its branches outside of the State of Indiana to dealers located in Indiana. The portion so assessed as shown by said audit so attached was:

	1935	1936	1937	Total
Tax	$26,650.81	$19,901.31	$13,173.18	$59,731.30
Interest	10,854.72	5,591.95	2,336.13	18,782.80
				$78,514.10

Concurrently with the payment of the tax, and on January 17, 1939, plaintiff filed a petition for correction of amount of tax and refund of excess tax for the years 1935, 1936 and 1937, claiming a refund of all of the tax and interest assessed and paid on January 17, 1939 as above alleged. On March 22, 1939, the defendant, Department of Treasury, denied said claim for refund in all particulars, including the amount claimed as refund on receipts derived from sales

of plaintiff's branches located outside of the State of Indiana, on sales from said branches to dealers located in the State of Indiana.

39½ 4. On June 8, 1939, plaintiff filed in this Court its first paragraph of complaint for refund of so much of the additional tax paid, as above alleged, as was levied upon receipts from sales from taxpayer's branches located outside of Indiana to dealers within the State of Indiana. Thereafter, the defendants filed an answer to said complaint, admitting among other things the correctness of the amounts claimed as refund on the sales above described (as alleged in paragraph 5(a) of plaintiff's complaint and admitted in paragraph 5(a) of defendant's answer). Said cause was assigned for trial for December 23, 1940, and a pre-trial conference on November 26, 1940. Prior to said pre-trial conference, the Attorneys for the defendant indicated to the Attorneys for the plaintiff that they felt the case should be reconsidered by defendant, Department of Treasury, on its merits, and on November 25, 1940, plaintiff requested the defendant, Department of Treasury, to reconsider the ruling of the Department on a petition for refund. The Department did reconsider the ruling on petition for refund so far as the same related to the sales of the character above described, which sales represented receipts on which additional tax was paid as alleged in paragraph 5(a) of the complaint and admitted in paragraph 5(a) of defendants' answer as follows:

	1935	1936	1937	Total
Tax	$26,656.81	$19,901.31	$13,173.18	$59,731.30
Interest	10,854.72	5,591.95	2,336.13	18,782.80
				$78,514.10

The defendant, Department of Treasury, sent its Attorneys to Louisville, Kentucky, one of the branches of the plaintiff, and to Dearborn, Michigan, the home office of the plaintiff, and there interviewed officials and employees of plaintiff, examined records and documents, and also reviewed files and other information. On March 1, 1941, the defendant, Department of Treasury, acquiesced in the
40 plaintiff's petition for reconsideration of its ruling so far as the tax and interest above set forth were concerned, and upon said reconsideration agreed with the plaintiff that the receipts from the transactions above described were not taxable under the Indiana Gross Income

Tax Act, and that it would take the necessary steps to refund the tax paid on such receipts, and referred the matter to the refund section of the defendant for completion of the refund of the tax to the plaintiff. On or about March 1, 1941, the defendant notified plaintiff that said claim for refund had been allowed. Plaintiff acquiesced in such allowance and ruling, and concurred in and agreed to the refund to it of the amount set forth in this paragraph and referred to in its petitions for refund and in the ruling of the defendant of March 1, 1941 above referred to.

5. No part of the aforesaid tax and interest so paid by the plaintiff has been refunded to the plaintiff by the defendant. By reason of the premises herein alleged, an account was stated between the parties, and the defendant, Department of Treasury, is indebted to the plaintiff in the amount of Seventy-eight Thousand Five Hundred Fourteen Dollars and Ten Cents ($78,514.10), together with interest thereon, all of which is wholly due and unpaid.

Wherefore petitioner prays judgment upon the facts and law against the defendant, Department of Treasury, in the above sum, with interest, and for all further proper relief in the premises.

/s/ James A. Ross,
/s/ Harry T. Ice,
Attorneys for Plaintiff, Ford Motor Company.

Matson, Ross, McCord & Ice,
Of Counsel.

Receipt of copy of the foregoing acknowledged this 24th day of October, 1941.

/s/ Joseph P. McNamara,
Attorney for Defendants.

41 (Entry for October 27, 1941, continued.)

And the defendants file answer to the amendment of and supplement to the complaint, which answer is as follows:

42 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—117) * *

ANSWER TO AMENDMENT OF AND SUPPLEMENT TO COMPLAINT.

(Filed Oct. 27, 1941.)

I—Answer to Amendment.

Come now the defendants and by way of answer to the plaintiff's amendment to its original complaint, and by way of answer to the further and additional allegations placed in paragraph 4(c) on page 5, beginning at line 16, the defendants make the following answer to the additional allegations:

The defendants admit so much of the additional allegation as alleges that "in many instances, the cars and trucks are partially or totally financed by the dealers with finance companies;" the defendants further admit so much of the paragraph as alleges that "in some instances papers * * * for the purpose of securing the loans of the finance companies are executed at the gate of the plaintiff's plants or branches at * * * Louisville, Kentucky * * * by representatives of the truck-away-companies who have been given authority by such dealers to execute such finance * * * papers," but the defendants deny that in any

43 instance the title to the cars and trucks is transferred at the gate of the plaintiff's plants or branches, and the defendants further deny that papers transferring title to the cars and trucks are executed at the gate of the plaintiff's plants or branches at Chicago, Illinois, Cincinnati, Ohio, Louisville, Kentucky, and Dearborn, Michigan, and the defendants further deny that the representatives of the truck-away-companies have been given authority by the dealers to execute any title papers. The defendants for a further answer allege that the finance papers that are executed at the gate of the plaintiff's plant or branch at Louisville, Kentucky, are not dated as of the date that

such papers are executed, but are dated with the date upon which the truck-away-company finally delivers the cars or trucks to the dealer's establishment located within the State of Indiana. Further, the defendants allege that during the taxing periods in question in this cause of action, cars and trucks which had been financed at Louisville, Kentucky, were in some instances refused by the dealers upon the arrival of such cars or trucks at the dealer's place of business located within the State of Indiana, and that in such instances the plaintiff, Ford Motor Company, delivered such cars or trucks to another Ford dealer within the State of Indiana, or caused delivery of such cars or trucks to be made to the plaintiff's Indianapolis, Indiana branch. In such instances the title to said cars or trucks refused by the first Ford agent would later be taken by another Ford agent, or taken to the plaintiff's Indianapolis, Indiana branch and from that point delivered to another Ford agent, and would show a transfer of title direct from the manufacturer, i. e., the plaintiff, Ford Motor Company, to the Ford agent to whom the goods were finally sold and delivered, and did not indicate any transfer of title whatsoever to the Ford agent upon whose behalf so-called finance papers had been allegedly made out at the plaintiff's
44 Louisville, Kentucky, branch.

Further answering the paragraph of amendment, defendants admit that "in some instances remittance is made directly by the finance company for all or part of the purchase price so financed, such payment being made from the finance company's offices outside of the State of Indiana to the branches of the plaintiff at Chicago, Illinois, Cincinnati, Ohio, Louisville, Kentucky, and Dearborn, Michigan," but the defendants deny that the remittances were made in the manner described immediately above in each and every instance or in all instances, and the defendants respectfully represent to the Court that the plaintiff, Ford Motor Company, has never revealed to the defendants the aggregate amounts in which remittances were made by the finance companies from points outside the State of Indiana and from points inside the State of Indiana. The defendants deny the allegation that "the plaintiff looks to the truck-away-companies for all remittances and said companies are responsible for all collections and damage to or loss of cars or trucks in transit."

The defendants for further answer to the plaintiff's

"I—Amendment to Complaint," assert that as to any statement or allegation or part thereof therein contained not heretofore specifically admitted or denied in the foregoing "I—Answer to Amendment," that the defendants now deny any such statement or allegation or averment, or part thereof.

45 II—Answer to Supplemental Complaint.

Come now the defendants and each of them, and by way of answer to the supplement of the plaintiff's original complaint, and for a second further and additional paragraph of answer, allege that:

Second Paragraph.

Come now the defendants and for answer to the second and further paragraph of complaint, state that:

1. The defendants admit that jurisdiction is founded upon diversity of citizenship and an allegation of the amount involved. Defendants admit that the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business at Dearborn in the State of Michigan. The defendants admit that the defendant Department of Treasury of the State of Indiana is an executive department of the State of Indiana, vested with the enforcement and application of the Indiana Gross Income Tax Act of 1933 (Chapter 50 of the Indiana Acts of 1933) and that Act as amended by the Acts of 1937 (Chapter 117 of the Indiana Acts of 1937). The defendants further admit that M. Clifford Townsend, at the time of the filing of the original complaint was the Governor of the State of Indiana; that Joseph M. Robertson, at the time of the filing of the original complaint, was the Treasurer of the State of Indiana; and that Frank G. Thompson, at the time of the filing of the original complaint, was the Auditor of the State of Indiana, and that each of the foregoing were at the time of the filing of the original complaint citizens and residents of the State of Indiana and of the County of Marion, and that at the time of the filing of the original complaint they together constituted the Board of Department of Treasury of the State of Indiana. The defendants

admit that the amount of controversy exceeds, exclu-
46 sive of interest and costs, the sum of $3,000.00.

2. The defendants admit that the plaintiff filed returns with the defendant Department of Treasury for the annual taxing periods of 1935, 1936, and 1937, and paid to the Department of Treasury the tax for each of said annual taxing periods as was computed by the amounts reflected on such returns prepared by the plaintiff, and the defendants admit that these returns for the annual taxing periods of 1935, 1936, and 1937, prepared by the plaintiff, were filed with the Department of Treasury by the plaintiff at the proper time, as required by the statutes of the State of Indiana; but the defendants state that as to the allegation of plaintiff that the plaintiff "paid all of the tax for each year as it in good faith deemed to be due," that the defendants have not sufficient information either to admit or deny the allegation with respect to good faith.

3. The defendants admit that on the 17th day of January, 1939, plaintiff paid to the defendant Department of Treasury $81,058.05, which payment represented additional taxes and interest assessed against the plaintiff for the annual taxing periods of 1935, 1936, and 1937. Defendants admit that the aforesaid tax and interest paid by the plaintiff was based upon a Notice of Proposed Assessment dated July 1, 1938, issued by the defendant Department of Treasury, and supported by an audit which was attached as a part of the proposed assessment, and which set forth in detail the basis of the proposed assessment. The defendants allege that the amounts reflected in the proposed assessment were assessed against the plaintiff and that all of the statutory provisions with reference to the making of an assessment were strictly adhered to. In answer to the allegation that "the major portion of said tax and interest was assessed on account of sales by plaintiff from its branches outside the State of Indiana to dealers located in Indiana," the defendants deny that the major portion, or any great portion of the said tax and interest was
47 assessed on account of any sale by plaintiff at a branch outside of the State of Indiana. But the defendants admit that the major portion of said tax and interest so assessed was measured by the gross receipts of the plaintiff derived from sales made within the State of Indiana where the delivery of the thing sold was made within Indiana but in instances where the plaintiff elected to bring

the car or trucks sold from one of its branches located outside of the State of Indiana. The defendants, further answering the paragraph of complaint, state that the defendants do not have sufficient information either to affirm or deny the allegations of amounts contained in the third, fourth, fifth and sixth lines of the paragraph numbered "3" appearing at the top of page 3 of the second paragraph of plaintiff's supplemental complaint. The defendants, further answering paragraph "3" of the second paragraph of the supplemental complaint, admit that concurrently with the payment of the tax, and on or about January 17, 1939, the plaintiff filed a petition for the correction of the amount of tax and a refund of excess tax for the taxes paid for the annual taxing periods of 1935, 1936, and 1937, and in such petition claimed a refund of all of the tax and interest assessed against it and paid on January 17, 1939. The defendants further admit that on or about March 22, 1939, the defendant Department of Treasury denied the said claim for refund in all particulars.

4. The defendants, for answer to the paragraph designated as "4" of the second paragraph of the supplemental complaint admit that on June 8, 1939, the plaintiff filed in this Court its first paragraph of complaint for refund, but the defendants deny that the taxes sought as a refund were either levied upon receipts or measured by receipts from sales from the taxpayer's branches located outside the State of Indiana to dealers within the State of Indiana, and defendants allege that the taxes were measured by the gross receipts of the plaintiff derived from Indiana

48 sales to Indiana dealers where the plaintiff transferred title to the purchaser within the State of Indiana, and in many instances received remittance therefor within the State of Indiana. The defendants admit that the defendants thereafter filed answer to the said complaint and that said cause was assigned for trial on December 23, 1940, and that a pre-trial conference was held on November 26, 1940. The defendants admit that prior to the said pre-trial conference the attorneys for the defendants indicated to the attorney for the plaintiff that they felt that the cause could be reconsidered by the defendant Department of Treasury and the defendants admit that on December 25, 1940, the plaintiff requested the defendant Department of Treasury to reconsider the ruling of the Department with reference to the plaintiff's petition for refund. The de-

fendants further admit that the defendant Department of Treasury did reconsider the ruling on the petition for refund. The defendants further admit that the defendant Department of Treasury caused its Chief Hearing Judge and the Deputy Attorney General assigned to said Department of Treasury to go to Louisville, Kentucky, one of the branches of the plaintiff, and to Dearborn, Michigan, the home office of the plaintiff, and that the Chief Hearing Judge and the Deputy Attorney General there interviewed officers and employees of the plaintiff, examined such records and documents as were presented for examination by the plaintiff, and also reviewed such files and received such other information as was presented by the agents of the plaintiff. The defendants allege that on each such instance plaintiff was represented by Mr. Harry T. Ice, its attorney, who presented such information and data and called such officers and employees of the plaintiff to give information as he deemed to the best interests of the plaintiff. The defendants admit that thereafter, and on March 1, 1941, the defendant Department of Treasury acquiesced in
49 the plaintiff's petition for reconsideration of its ruling, and issued a second letter of finding, dated March 1, 1941, which read as follows:

"March 1, 1941

"Ford Motor Car Company
Dearborn, Michigan

Gentlemen:

"Account No. 49-19204

"Reference is being made to the application of the Ford Motor Car Company for refund of certain amounts of gross income tax paid for the annual calendar periods of 1935, 1936 and 1937. This application for refund was filed on January 17, 1939, and after giving the application careful consideration the application was denied under date of March 2, 1939.

"On November 25, 1940, the taxpayer corporation, through its attorney, submitted a petition for a reconsideration of the Department's denial of its claim for refund and requested a rehearing in the matter. The request for a reconsideration and a rehearing was based upon the contention of the taxpayer corporation that the transaction concerning the sale of products manufactured or assembled by this taxpayer corporation at points outside of the State

of Indiana, and there delivered to Indiana customers within the territorial limits of that outside branch or assembly plant constituted a transaction completed in its entirety outside of the State of Indiana, and thus did not fall within the purview of the Gross Income Tax Act.

"The Department acquiesced to the taxpayer corporation's petition, and conferences concerning this matter were held with the officials of the taxpayer corporation's assembly plant at Louisville, Kentucky, on December 20, 1940, and with the executive staff of the taxpayer corporation's main office at Dearborn, Michigan, on January 7, 1941.

"At these conferences evidence was presented to show that the Ford Motor Car Company accepts orders for its products from Indiana customers. These Indiana customers are for the most part retail automobile dealers. The Ford Motor Car Company will make delivery of such automobiles to the Indiana customers or to their authorized agents at the delivery gate of its out-of-state manufacturing plant or assembly plant. Deliveries of the products desired by Indiana customers are made under conditions whereby the Ford Motor Car Company, at the time of the delivery to the customers or the customers' authorized representatives, will be paid for the products, or appropriate financing will be arranged for by the customers or by their authorized agents.

"It is further disclosed that the Ford Motor Car Company in regard to sales made to Indiana customers resident within the territorial jurisdiction of the outside manufacturing and assembling plants does not have the obligation or the responsibility, under the terms of the sale, to make delivery of the products desired by Indiana customers to those customers across State lines, nor does any obligation or responsibility to initiate such transportation across State lines exist. It is indicated that the entire responsibility of the Ford Motor Car Company to the customer ceases at the time of delivery of the products to the Indiana customers or to their authorized representatives at the delivery gate of the manufacturing or assembling plant outside of the State of Indiana.

"It is, therefore, indicated that such a transaction is completed at a business situs entirely outside of the State of Indiana, and that such a transaction is not a transaction made in interstate commerce, and that the question of facilities is not existent in this transaction.

"The Department will accordingly take the necessary steps to make refund of the gross income tax paid on the transaction outlined above. This file will be remanded to the Refund Section of this Department for further handling."

The defendants further answering paragraph "4" admit that on or about March 1, 1941, the defendants mailed the letter of findings reproduced above to the plaintiff.

The defendants for further answer to the plaintiff's paragraph "4" of the supplemental complaint state that as to any allegation or averment or part thereof contained in the said literary paragraph "4" not either specifically admitted or denied in the foregoing paragraph "4", that the defendants now deny each such averment or allegation or part thereof.

5. The defendants, for answer to the paragraph designated as "5" of the second paragraph of the supplemental complaint (to be found at the bottom of page 4 of the supplemental complaint), admit that no part of the aforesaid tax and interest so paid by the plaintiff has been refunded to the plaintiff by the defendants. The defendants deny the allegation that "by reason of of the premises herein alleged, an account was stated between the parties, and the defendant, Department of Treasury, is indebted to the plaintiff in the amount of Seventy-eight Thousand Five Hundred Fourteen Dollars and Ten Cents ($78,514.10), together with interest thereon, all of which is wholly due and unpaid." The defendants, for further answer to the paragraph designated as "5" of the second paragraph of the supplemental complaint, allege that the plaintiff has
51 never submitted to the defendant Department of Treasury any computation showing the volume of the gross income that it derived from sales transactions completed at the plaintiff's business situs located entirely outside the State of Indiana, nor has the plaintiff segregated such transactions on its books and records; nor has the plaintiff by petition for refund or otherwise ever indicated the amount of tax which it alleges should be refunded as the result of gross income received from transactions completed at a business situs entirely outside of the State of Indiana; and the defendants for further answer to the paragraph designated as "5" allege that the defendants, at great inconvenience and cost to the defendant Department of Treasury, have audited the books, records, invoices, and other information of the plaintiff in an effort to ascertain whether or not any gross receipts derived from a

transaction completed at a business situs entirely outside the State of Indiana was because of the information first revealed by the plaintiff inadvertently utilized as the measure of the additional taxes assessed against the plaintiff for the years 1935, 1936, and 1937; that the defendant Department of Treasury has completed such audit and that the five auditors so assigned to said audit are presently engaged in preparing their audit reports with reference to this matter; that the preparation of this audit report is complicated by the fact that the records of the plaintiff, Ford Motor Company, were scattered in five states and that with reference to the furnishing of cars from one branch, i. e., the Louisville branch, during the annual taxing period of 1937 there were eight hundred seventy-four cars which were either refused by the dealer or the details of the transaction changed before the completion of the delivery to the dealer, and by the fact that the plaintiff had not coordinated its bookkeeping record to present aggregates of such refusals or changes; that upon the completion of the preparation of the audit report, the defend-
52 ant Department of Treasury intends to make a refund to the plaintiff in the full amount shown by such report to have been assessed by virtue of receipts derived from transactions completed at a business situs entirely outside the State of Indiana, if such receipts were originally used in the measure of the tax assessed against the plaintiff.

6. The defendants state that as to any allegation or averment or statement, or part thereof, contained at any place in the second paragraph of supplemental complaint filed herein by the plaintiff, which has not either been specifically admitted or denied heretofore in this answer, that the defendants now deny each and every such allegation, averment, statement, or part thereof.

Wherefore, the defendants pray for judgment upon the facts and law against the plaintiff, Ford Motor Company, and that the Ford Motor Company take nothing by this suit, and for all other proper relief in the premises.

/s/ George N. Beamer,
George N. Beamer,
The Attorney General,

/s/ Joseph W. Hutchinson,
Joseph W. Hutchinson,
Deputy Attorney General.

/s/ Joseph P. McNamara,
Deputy Attorney General,
Attorneys for Defendants.

Receipt of a copy of the foregoing "Answer to Amendment of and Supplement to Complaint" is acknowledged this 27th day of October, 1941.

/s/ Harry T. Ice,
Attorney for Plaintiff.

53 And afterwards to wit at the November Term of said Court on the 9th day of March, 1942, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

It is ordered by the Court that the above entitled cause be and the same is hereby referred to Albert Ward as Special Master, to take the evidence and report the same, together with his findings of fact and conclusions of law, to this Court with all convenient speed.

54 And afterwards to wit at the November Term of said Court on the 10th day of February, 1943, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

This cause coming on now to be finally heard by the Court and the parties appearing by their respective attorneys, and the Court having heard the evidence and the arguments of counsel and being sufficiently advised in the premises, overrules each and every objection of plaintiff to the report of the Special Master herein and now, pursuant to Rule 52 of the Rules of Civil Procedure, signs and files herein its Special Findings of Fact and states its Conclusions of Law thereon, which said Special Findings of Fact and Conclusions of Law are ordered by the Court filed and made a part of the record in this cause, all of which is now done.

55 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—117) • •

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

(Filed Feb. 10, 1943.)

Pursuant to Rule 52 of the Rules of Civil Procedure the Court now makes its Findings of Fact and Conclusions of Law:

56 **Findings of Fact.**

Finding No. One.

(a) Plaintiff, Ford Motor Company (hereinafter sometimes referred to as either "plaintiff" or "Company") when this action was commenced, was, and is now a corporation organized under the laws, and was then and is now a citizen of the State of Delaware.

(b) Defendant, Department of Treasury of the State of Indiana, is an Executive Department of said State, vested with the enforcement and application, through an administrative division known as the Gross Income Tax Division, of the Indiana Gross Income Tax Act of 1933 (Ch. 50, Acts 1933), as amended by Acts of 1937 (Ch. 117, Indiana Acts of 1937). When this action was commenced, Defendants, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, were, and they now are each citizens of the State of Indiana, and at the time of filing the complaint herein together constituted the Board of Department of Treasury of said State. All defendants are hereinafter sometimes referred to as either "defendant" or "Department".

(c) Gilbert K. Hewit is the Director of the Gross Income Tax Division of the Department of Treasury, and has been the Director of that Division continuously since November, 1939. As such, he is vested with the authority to administer the provisions of the Indiana Gross Income Tax Act of 1933 as amended.

(d) Elmer F. Marchino is the Hearing Judge of the Gross Income Tax Division of the Department of Treasury, and has been such continuously since May, 1933. As such, he hears and determines objections to proposed additional assessments of Gross Income Tax and petitions
57 for the refund of Gross Income Tax. He has the power and authority to determine the facts involved on any

notice of proposed assessment of additional tax or petition for refund of tax, and the right to determine, from a legal status, the policy of the Department.

(e) Joseph P. McNamara is a Deputy Attorney-General of the State of Indiana and is one of the deputies assigned by the Attorney-General to the Gross Income Tax Division, Department of Treasury. As such, in addition to other duties assigned by the Attorney-General, he defends the department in suits for refund of taxes and other legal matters in which said department may be or become involved. He advises the department in connection with such litigation and represents it in court. He has occupied such position continuously since May, 1933.

Finding No. Two.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

Finding No. Three.

Throughout the Finding all facts relate to the period from January 1, 1935 to March 31, 1939, unless it is otherwise specifically stated.

58 Finding No. Four.

(a) Plaintiff is engaged in the business of manufacturing and selling automobiles, trucks and parts. Its principal manufacturing establishment (the River Rouge plant), its home office and principal place of business, all are located at Dearborn in the State of Michigan. The establishment at Dearborn is a plant for manufacturing the parts of its products, also a plant for their assembly into finished cars and trucks and a branch with limited distributing territory, none of which extends into Indiana. Plaintiff has no factory or assembly plant within the State of Indiana in which its products are manufactured or assembled, but all of the products distributed in Indiana are either manufactured and assembled at Dearborn, Michigan, or assembled at Chicago, Illinois, Cincinnati, Ohio and Louisville, Kentucky. At Indianapolis, within the State of Indiana plaintiff maintains a branch for storage and for distribution of its cars, trucks and parts. Chicago, Louisville and Cincinnati are also branches of plaintiff, for the assembly of cars and trucks, and for distribution of its cars, trucks and parts. Occasionally at the Chicago,

Louisville and Cincinnati branches some cars may be on hand and lined up in the open on property adjacent to the plant. Generally these cars are awaiting the addition of some part or correction of some defect apparent from checking at the end of the assembly line, but also occasionally they are cars held where there is no immediate order from a dealer. No buildings are maintained at such branches for storing cars and trucks.

59 Finding No. Five.

All of the products of plaintiff in the transactions involved here, are sold to the ultimate consumers by independent dealers who have contracted with the plaintiff, which contracts were executed subject to the approval of the plaintiff's Dearborn office. The dealers, residents of the State of Indiana, execute with plaintiff an instrument in writing designated "Sales Agreement". Such agreement is in the following form:

"Louisville Branch"

"Ford Motor Company

Sales Agreement

Agreement made at Dearborn, State of Michigan, as of this 13th day of May, 1935, by and between Ford Motor Company, a Delaware corporation with its principal place of business at Dearborn, Michigan (hereinafter called "Company"), and Jackson Motor Sales, Inc., a corporation of the State of Indiana with principal place of business at Crothersville, Jackson County, State of Indiana (hereinafter called "Dealer").

In consideration of the promises herein made to each other by the parties hereto it is agreed as follows:

Selling Rights

(1) Company agrees to sell and Dealer agrees to purchase, for resale for use within the boundaries of the United States of America, Ford automobiles, trucks, Chassis, automobile bodies, pick-up bodies, truck bodies, cabs, accessories and parts (hereinafter sometimes collectively referred to as Company's "Products") upon the terms, conditions and provisions hereinafter specifically set forth and subject to the right reserved by Company to sell to other Dealers and direct to retail purchasers in any part

of the United States without obligation for any commission to Dealer on any such sale.

Prices, and Terms

(2) Company will sell its products to Dealer f. o. b. Detroit, Michigan, at such net list price, or at such discounts from published list prices as are from time to time filed by Company. Payment by Dealer is to be in cash before delivery, or by paying sight draft attached to bill of lading, including exchange. Receipt from Dealer or Dealer's bank of any check, draft or other paper shall not be held to constitute payment, and if Company is unable to obtain U. S. currency on any such check, draft or other paper for any reason whatever within 30 days after receipt of same, Dealer shall reimburse Company, upon request, in full, including any expenses sustained by Company in endeavoring to realize on such paper.

60 Freight and Packing

(3) In addition to the payments hereinbefore specified, Dealer shall pay Company such amount as Company shall from time to time determine for freight, crating, boxing, packing, double-decking, loading, delivering, and other handling expense. On rail or boat shipments, Dealer shall be credited against the amount so fixed, in a sum equal to any freight actually paid by Dealer.

Taxes

(4) In addition to the specified purchase price, Dealer shall pay a sum equivalent to any tax imposed by any law of the United States or of any of the States upon the manufacture or sale of any article sold under this agreement. Dealer shall also pay any excise or other taxes or fees which may be imposed on Company's products, or on account of such business, or on Dealer's stock, or Comapny's products in transit, to Dealer, or on the transportation, advertisement or sale thereof.

Change in Prices

(5) "List Prices" of all Ford products shall be subject to change at any time and from time to time without obligation on Company to adjust with Dealer as to price of any product shipped, or paid for but not in transit, at the time such price change becomes effective.

Title

(6) Title to all Company products until actually paid for by Dealer shall be and remain in Company; but regardless of title remaining in Company or having passed to Dealer all shipments shall be at Dealer's risk from the time of delivery to carrier at place of shipment.

(7) Dealer agrees specifically as follows:

Place of Business—Representation

(a) To maintain a place of business (and only one place of business unless service station is separate from sales room) suitably located and equipped as sales room and service station and acceptable to Company; to conspicuously display effective signs; to carry an adequate stock of genuine Fords parts; to install and maintain tools and machinery in said service station as recommended by Company; to employ competent salesmen; and to make repairs in a workmanlike manner on products of Company whether sold by Delaer or not. Company shall not be responsible for any expenditures made or incurred by Dealer in preparation for the performance, or in the performance of this agreement.

U. S. Government Business

(b) To turn over if and when requested by Company inquiries or orders received from the United States Government or any department thereof or from the American Red Cross, without payment of any commission, remnueration, or charge for handling.

61 Demonstrators

(c) To purchase, and at all times maintain in good running condition and clean order, for demonstration or exhibition only, at least one Ford automobile and at least one truck of the current year's production.

Retail Buyer's Order and Deposit

(d) To obtain from each purchaser of a Ford automobile, truck, cab or chassis, a written order, on Company's form, signed in duplicate by the purchaser, and a cash deposit of not less than $25.00 on each automobile, truck, cab or chassis, and to furnish Company, upon its request, with one signed copy of order.

Orders on Hand at time of Termination

(e) To turn over to Company, or its nominee, on termination of this agreement, all unfilled retail orders, and deposits made thereon, and names and addresses of owners and prospective purchasers; it being intended that this clause shall operate immediately upon termination of this agreement as an assignment of Dealer's rights and interest in and to said orders and deposits.

Repair Parts

(f) Not to recommend parts other than those furnished by Company unless previously approved by Company, nor to substitute parts other than those furnished by Company if Company's parts are requested, nor to sell parts other than those furnished by Company unless specifically requested by purchaser.

Advertising

(g) Not to advertise or deal in Company's products in a manner detrimental to it or to any of its dealers, nor to publish or in any manner use advertising matter or to continue sales policies to which Company may object as detrimental to its good will. On termination of this agreement Dealer agrees to immediately remove, at Dealer's expense, all Ford signs from Dealer's place of business and to discontinue all Ford advertising.

Trade-Mark

(h) Not to use the words "Ford," "Fordson" or "Lincoln," or coined words or combinations containing the same, or any other trade-mark or trade name adopted by Company, as a part of Dealer's firm name or trade name.

Patents

(i) Not to contest the validity of any patent, right or trade-mark used or claimed by Company, nor to contest the right of Company to exclusive use of any trade-mark or trade name at any time adopted by Company.

Ten Day Reports

(8) Recognizing that the receipt of information called for on Dealer's Ten-Day Report is if Vital Importance to the production and distribution of Ford products, Dealer specifically agrees to see that his report is prepared ac-

curately and forwarded to the branch promptly on dates specified therein.

(9) It is further mutualiy agreed that:

Orders

(a) Dealer will furnish Company, if requested, prior to the tenth of each month, an order for the number of Ford automobiles, trucks, cabs and chassis that Dealer will purchase from Company during the succeeding month. Company agrees to give careful consideration to such orders, but expressly reserves the right to follow or depart from such orders according to its discretion. Company shall in no way be liable for any delay in shipments, however caused, nor for shipments over other than specified route.

Limit of Authority Warranty

(b) Dealer has no authority to make any representation concerning, or on behalf of, Company nor to make any warranty concerning its products, but shall refer purchasers to "Manufacturer's Warranty" printed on the back of Retail Buyer's order. Dealer shall not in any manner assume or create obligations on behalf of Company, nor in any manner act as its agent. Dealer shall at all times permit Company's representatives to have access to Dealer's place of business to ascertain the adherence of Dealer to the above and to all other provisions of this agreement.

Termination

(c) This agreement may be terminated at any time at the will of either party by written notice to the other party given either by registered mail or by personal delivery, and such termination shall also operate to cancel all orders theretofore received by Company and not delivered.

Products on Hand at Time of Termination

(d) Upon termination of this agreement Company may, at its option, repurchase from Dealer all or any part of Company's products in Dealer's possession, and Dealer agrees to sell such products to Company at the price paid therefor plus freight but less any liens or encumbrances thereon. And Dealer hereby grants Company the right to enter the premises of Dealer upon termination of this agreement and to take possession of all or any part of said prod-

ucts upon tender of the purchase price thereof, determined as above.

Law of Agreement

(e) This is a Michigan Agreement and shall be construed according to the laws of the State of Michigan. If any provision of this agreement is held to be invalid or unenforceable, this contract shall, as to such provision, be considered divisible and the balance of the agreement shall be valid and binding.

Assignment

(f) This agreement may not be assigned by Dealer without written consent of Company.

Prior Agreements

(g) If prior to the date hereof a sales agreement shall have been in effect between the parties hereto, Company and Dealer agree, each in consideration of release by the other from the obligations and rights thereunder existing, that such prior sales agreement is hereby terminated and cancelled, and after the date hereof all the rights and obligations of the parties hereto shall be governed and controlled exclusively by this agreement.

Amendments

(h) The terms of this agreement may not be enlarged, varied, modified or cancelled by any agent or representative of Company, except by an instrument in writing executed by the President, Vice-President, Secretary, or
63 Assistant Secretary of Company, and Company will not be bound by any alleged enlargement, variation, modifications, or agreement not so evidenced.

No Understanding Not Contained Herein

(10) As a condition precedent to Company entering into this agreement, Dealer represents and warrants that he has carefully read over each and every part of this agreement, and understands each and every term thereof; and further represents and warrants that no representations or statements have been made to him by the Company, or its officers, agents, employees or representatives, which would in any way tend to add to, modify or change the terms, or any one or more of them, of this agreement.

(11) This agreement shall not bind Company until it is signed by either its President, Vice President, Secretary or Assistant Secretary.

In Witness Whereof the parties have executed this agreement as of the day and year first above written.

Jackson Motor Sales, Inc.
(Dealer's Trade Name)
By: E. W. Franz,
Secy. & Treas.
(Signature and Title)

Ford Motor Company,
By: (Signed) A. G. Coulton,
Assistant Secretary."

64 Finding No. Six.

All dealers are procured by the branch of the plaintiff which has jurisdiction of the territory in which the prospective dealer is located; the dealer receives his training from, places his orders with, makes his ayments to, and directs correspondence to the branch that has the territory in which he is located. The agreements with dealers always specify the branch of the plaintiff to which the dealer is assigned by the plaintiff.

Finding No. Seven.

All of the dealers of the plaintiff in the State of Indiana are assigned to plaintiff's branches at either Indianapolis, Indiana, Chicago, Illinois, Cincinnati, Ohio or Louisville, Kentucky on the basis of territorial boundaries set up by plaintiff for each of the branches. The Louisville branch has assigned to it, in addition to its territory in Kentucky and part of Tennessee, the Counties of Warrick, Spencer, Dubois, Perry, Crawford, Orange, Jackson, Washington, Harrison, Floyd, Clarke and Scott, which are Counties within Indiana lying north of the Ohio River and geographically close to Louisville. The Cincinnati branch has, in addition to its territory in part of Ohio and part of Kentucky, the Counties of Switzerland, Ohio, Ripley, Dearborn and Franklin, which are Counties within Indiana lying north of the Ohio River and geographically close to Cincinnati. The Chicago Branch has, in addition to its territory in part of Wisconsin and part of Illinois, the Counties of Lake, Porter, LaPorte, St. Joseph, Elkhart, Starke, Marshall and Kosciusko, which are Counties within Indiana
65 lying south and east of Lake Michigan and geographically close to Chicago. The Indianapolis branch territory consists of all the remaining Counties in the State of

Indiana, also the Counties of Douglas, Edgar, Coles, Clarke, Cumberland, Jasper, Crawford and Lawrence in the State of Illinois. The territorial allocations of the various branches existed several years prior to the year 1933 as set forth above without change. They were established in the first instance primarily on the basis of the distance from the branch to the County seat of the Counties in the territory. Geographical and topographical factors were also considered in the establishment of territories, as were also transportation facilities.

Finding No. Eight.

(a) All dealers on or before the 10th day of each month place "orders" for the cars which they desire for the succeeding month. Such orders are placed on a form provided by the Company, and the dealer indicates in complete detail the class of car, whether Ford, Mercury or Zephyr, the body type, the color combination, the type of tires, the kind and color of upholstery and the special equipment, such as radio and heater to be placed in each car. Such orders are forwarded by the dealer to the branch of the Company to which the dealer is assigned, and when received are tabulated by the branch on the car and truck requirement form provided by the plaintiff, and on or before the 15th day of each month, the branch advises the plaintiff's home office of Dearborn of the total requirements of dealers, which is the number of units dealers in the territory estimate they can sell, of the branch for the succeeding month.

Such "orders" are furnished to the plaintiff pursuant
66 to, and subject to the provisions of, the Sales Agreement set out in Finding No. Five.

(b) Thereafter and about the 23rd of each month, the home office of the plaintiff sends to the branch car allotments for the succeeding month. The allotments are based on the requirements of the branches after the necessary adjustment to production schedules and assembly plant capacities. When cars are in demand and the plaintiff's plant at Dearborn and its various branches are operating at capacity, the branch's statement of requirements may be reduced on the allotments, since the supply of cars is limited to the productive capacity. When the seasonal demand for cars is low, the allotment to branches may be slightly increased over the stated requirements in order to maintain a full time or part time production schedule.

(c) The branches that have assembly plants are notified on the allotment form of the branch or branches to which cars and trucks to be assembled will be shipped, and of the number for their own dealers. The branches that have no assembly plant are informed as to the branch or branches from which the cars allotted to them will be shipped.

(d) Immediately after the allotments to branches the branches prepare a schedule of shipments to dealer in accordance with the dealer's orders previously placed. The schedule covers the entire month and indicates the details of the scheduled delivery of the various cars ordered, as to type, color, upholstery, special equipment, etc. In some cases the schedule of deliveries will be sent to dealers only at ten days intervals. But in any event they are sent out at least ten days in advance of delivery.

(e) On the basis of branch allotments, the plant at
67 Dearborn schedules the shipments of the necessary parts for assembling the cars scheduled for assembly at the various assembly plants. The schedule is so timed that the parts arrive by train loads twice or oftener a day at the assembly plant and are unloaded at the end of various sub-assembly lines. At the assembly branch, a production schedule is built on the basis of scheduled shipments, and a production order is prepared for each car which carries the entire detail as to the type of car, color, upholstery, equipment, etc. These production orders tie in with the assembly schedule, and the cars are assembled in the order of the serial number of the production orders, without regard to the type of car. Thus, for example, the cars will come off of the assembly line in the production order routine. One car may be a two-door black sedan. The car immediately following it may be red open sport car with built-in radio and white side-wall tires. The car immediately following it may be a cab-over-engine truck, and the next may be a station wagon and so on. From the individual production orders which are prepared before the process of assembly starts, clerks at the branch prepare an invoice on the regular form of the plaintiff which describes the car, the color, the type of upholstery, special equipment, is dated as of the date it is prepared, and is addressed to the dealer who had previously ordered the car and contains the price of the unit complete with all charges. The invoices some times are prepared two or three days in advance of assembly of the cars. At the

Chicago branch after January 15, 1937, the invoices were not prepared until the motor was placed on the chassis and the invoice bore the motor number, but the invoices
68 were ready before the car was off the line. These invoices when prepared in all cases are placed in the same order as the production orders, and are sent to a station some one hundred feet or more from the end of the assembly line. A man at this point, when the car comes down the line, takes the invoice and places it on the windshield of the still incomplete car. The production and invoicing are so integrated that the cars come down the line in the same order that the invoices are in so that the top invoice in each instance matches the next car on the production line. All cars are built to some dealer's order (cars are at times diverted as stated in Paragraph (n) infra). At the end of the line, a checker reviews the invoice to the dealer and determines whether the car matches all of the details of the dealer's order reflected on the invoice, and whether the car has all of the required equipment.

(f) The car then rolls off of the end of the line to the door of the assembly building where it is filled with gas and oil, and then is driven out of the plant by an employee of the plaintiff, and on the grounds of the plaintiff receives a short road test and a final check. It is then brought to the gate of the assembly branch and at that gate a representative of the independent truck-away company, or the dealer himself who is to receive the car checks the car with the car checker of the plaintiff. If the car is found to match the invoice, the checker of the plaintiff at gate signs the invoice on the line marked "Initials of Car Checker." The dealer or the independent truck-away company as agent of the dealer signs the invoice on the line marked "Signature of Dealer (indicating receipt)", and dates his signature with the date that the car leaves the gate.
69 The dealer, or the dealer's representative of the truck-away company, then gets into the car and drives it off of the plaintiff's property.

(g) Three copies of the invoice were made when the car was going to a dealer of the branch assembling the car. The original went to the dealer and the second and third copies to the accounting department of the branch. A fourth copy was made when the car went to the dealer of another branch. This fourth copy was sent directly to the branch with which the dealer was connected.

(h) It has been a custom of long standing for the employees of the truck-away company to sign for the dealers as their agent. All dealers know of the practice, and have acquiesced fully in it.

(i) No cars or trucks are sold by the Company on open account. The dealer by arrangements with his branch either (a) pays for the car in full before it leaves the gate (mostly cases where dealer picks up the car personally or has a customer pick it up); (b) pays for it by finance papers covering all or part of the purchase price either executed at the branch by the representative of the truck-away company, who is duly authorized by a power of attorney to execute on behalf of the dealer such paper, or signature of the papers at destination by the dealer himself; or (c) payment at destination to the truck-away company for the car in full or the balance due on it on delivery to the dealer. At all branches except the Chicago branch finance papers are signed by the employees of the truck-away companies as agents of the dealer. Plaintiff for information keeps a file of copies of powers of attorney given by dealers to the finance companies for the employees of the truck-away companies to execute such finance papers.

At the Louisville and Cincinnati branches the finance
70 papers on the portion of the sales price that is financed are signed at the cashier's cage in the plaintiff's branch before the car or truck leaves the gate of the branch. All such papers are dated the day they are signed. This procedure is followed regardless of whether the car is going to a dealer of that branch or to a dealer of the Indianapolis branch. Collection is made at the destination for only that portion not financed. At the Chicago branch no powers of attorney are used by the finance companies and the finance papers on all cars going to dealers of the Chicago branch are signed at the dealer's place of business on arrival of the car or truck. On cars shipped from the Chicago branch to dealers of the Indianapolis branch, the finance papers are signed by employees of the truck-away company who have authority by powers of attorney from the dealers to sign the papers. The finance papers are presented to the Indianapolis branch already signed. Whether they are signed in the Chicago office of the truck-away company or in the Indianapolis office of the truck-away company does not appear. On shipments out of the Indianapolis branch from stock, finance papers are also

signed by the truck-away company at its Indianapolis office. The finance papers so signed by the truck-away company's employees as agents for the dealers are "trust receipts." The trust receipt recites that a "security interest" in the car or truck described "has passed to the Entruster (finance company)" subject to the usual rights of the Entruster to cause the security by sale or otherwise to be applied to the debt, with the usual covenants by the "Entrustee (dealer)" as holding for the Entruster and selling only upon his consent. Such trust receipts are executed by the parties with full knowledge of the plaintiff. The truck-away company would pick up at the dealer's place of business in Indiana, on delivery of the car or truck, the type of paper which was approved for payment of the bal-
71 ance due on the car or truck, i. e., a check, a certified check, or a bank draft, and collect the delivery charges, and such charges and such paper were then taken by the employee of the truck-away company on a return trip and delivered to the branch from which the car was shipped, except that in the case of the dealers of the Indianapolis branch the payment during part of the period, as hereinafter explained, was taken to the Indianapolis branch rather than to the branch from which the car was shipped.

(j) In many instances where the cars or trucks are partially financed, the finance papers have been sent from the branch to the office of the finance company located in the same city as the branch and money paid on the paper to the plaintiff before the car or truck is delivered to the dealer. The truck-away company in many instances holds a car for two days or more to make up a load, while funds are paid on finance paper to the branch on the same day as the receipt of the paper.

(k) That the invoice signed at the gate by a dealer, or his agent, a copy of which is left at the company, is as follows:

72 Plaintiff's Deposition

EXHIBIT NO. 9-D

Nov. 18, 1941

Paul C. Carpenter

Notary Public State of Indiana

Form 419 C

Shipping Branch Reference
Ford Motor Company
Incorporated

Invoice Date
852 IPLS Louisville, Ky. Invoice No. C 126003 C
11 17 41

Branch Paid or Release Stamp
Bank Orders or Adjustments

Sold
to 454 John Doe
Doeville, Ind
Shipped to and Destination Same
Date Shipped
UCC
Car Initial & No.
How Shipped and Route PPD Cent. Trailed 95

Quantity	Description	Unit Price	Amount
1	Super Dlx Sedan Coupe Fl R Blue Mon		700.00
	NT-AC 1.74 of 3.48		5.22
	Convoy Collection Charge		.10
	Company's Charge for distribution and delivery		30.50
	Federal Tax—Tires		4.18
	Federal Tax—Passenger Autos		50.27
	Federal Tax—Com'l and Truck		4.42
16 Gals 5 Qts	9 Pts. Gals. Antifreeze		2.00
	Sales Promotion Material		
3			
	Invoice Total		801.11
	Initials of Car Checkers		720.00

Signature of Dealer (indicating receipt)

73 That it has been a custom of long-standing for employees of the track-away or convoy company to sign the foregoing invoice for the dealers and to accept the cars for them. All dealers know of the practice and have acquiesced fully in it. The plaintiff looks to the truck-away company for payment in full. In the event the truck-away or convoy company fails to collect for the car or truck in the manner specified by the plaintiff, it is obligated to and does make good the price of the car or truck to the plaintiff. The risk of loss of the car or truck is the truck-away or convoy company's, until delivery is made by it to a dealer.

(l) The truck-away or convoy companies were not owned by the plaintiff. Up until sometime in 1937, they operated as contract carriers for the plaintiff, and thereafter as common carriers under permits of the Interstate Commerce Commission, for the transportation and delivery of the cars involved to the dealers in Indiana, and for and on behalf of the plaintiff made collections from such dealers in Indiana of delivery charges on such cars, and made collection of other amounts from such dealers in Indiana for and on behalf of the plaintiff as herein set out.

The plaintiff actually paid the truck-away or convoy company for the delivery charge in the first instance; by a specific item of "Company's Charge for Distribution and Delivery" set forth on every invoice, plaintiff charged the Dealer with freight F.O.B. Dearborn, Michigan, regardless of the point from which delivery is made, and made the truck-away or convoy company which delivered such products its agent for the collection of such charges from the Dealers in Indiana and the remission thereof to the branch from which the Dealer obtained such products, which collections were so made from said Dealers in Indiana before, or concurrent with the delivery of said products to them.

74 (m) The truck-away or convoy companies, while acting as contract carriers, prepared and took from the dealers a receipt upon which was printed the name of the carrier, the number of the receipt, the date of the instrument, the general form being shown by the following:

"Central Truck-away System, Inc.
Riley 4668 Indianapolis, Indiana
No. 21198
C.O.D. $67.86
Paid by Check No. ..... Date 3-4-36.

Received of Ford Motor Company, Louisville, Kentucky, the following Ford automobiles to be delivered to
Dealer's name (Frank Hatfield Co.
Address Indpls., Ind.
(then follows Auto Order No., Model, Motor No., and Charge)
Trailer No. 30 Driver Vise"

On the bottom of the receipt was the following:

"The above Ford automobiles were received, complete and in good condition.
Dealer's signature ....."

After the truck-away companies or convoys became common carriers, the Uniform Domestic Straight Bill of Lading was used which provided, among other things that

"The consignor shall be liable for the freight and all other lawful charges".

The plaintiff was aware that these forms were used but the forms were not prepared by the plaintiff but by the convoy or truck-away companies, and the forms were completed after the cars or trucks had left plaintiff's branch gate and were taken to the convoy or truck-away company's property.

(n) In some instances cars were re-billed by the plaintiff. Such re-billings might result from any one of the following causes: (1) an error in the original billing; (2) a refusal of the dealer to accept the car; (3) if a car
75 was originally billed out to a dealer on a C.O.D. basis, and the dealer decided he wanted to finance that car, it would be rebilled by plaintiff; (4) a great many times cars were re-allotted by the plaintiff's car distributor to a more urgent order than the one for which there was an original billing, and such cars were taken from the dealer to whom it was billed and re-billed by the distributor to some other dealer to save a sale to a dealer's customer; the distributor had authority to do this without contacting the dealer, and such distributor could change the specifications, rebill such cars before taken off the assembly line,

or while they were still on Ford property and before they went out the Ford gate, while on the transit company's lot or while in transsit, and after they reached the dealer. The plaintiff's car distributor controls the priority of delivery. The other dealer's order is subsequently filled by the plaintiff if dealer still desires delivery.

(o) The driver of the truck-away company brought back to the branch office a report, giving the exact reason for the return of the unit, which guided plaintiff in its further operations and rebilling, and from those records it could be ascertained whether the dealer actually refused the car because he did not want it; these records were normally kept in the regular correspondence files, but such files for the year 1937 of the Indianapolis office have been destroyed by plaintiff, as such files are discarded by it every three years.

(p) An analysis of rebillings made by plaintiff from the Indianapolis branch for the month of March, 1941 (not within the taxing period), shows the following:

Total number of cars billed out...		2454
Total number of rebillings	95	
Rebilled because dealers refused to accept	38	
Rebilled for other reasons	57	
	95	

76 A typical reason for the rebilling of the 57 was to give some dealer preference over the dealer to whom the car was originally consigned. The number of rebillings would run less percentage wise in the year 1937.

(q) An analysis of invoices for the year 1937, as made by witness R. E. Gage, an auditor for the defendants, shows the following:

	Indpls. Branch	Chicago Branch	Lo'ville Branch	Dearborn Branch	Total
Billing					
1—Invoices voided	92	1	—	—	93
2—Returned on M. R. S.*	188	121	338	103	750
3—Rebilled on New Invoice No.	209	22	124	33	388
4—Rebilled on same Invoice No.					
(a) Changed S/D to U.C.C.	14	57	306	71	448
(b) Changed basis of note and payment	86	3	106	16	211
Total	589	204	874	223	1,890

* M. R. S.—Merchandise Returned Sales
(Cars returned to Indpls. Branch)

EXPLANATION OF ITEMS
(by witness Gage)

1—Invoices voided—includes invoices made out covering sale of unit, which sale was never completed.

2—Returned on M. R. S.—includes all units actually shipped to dealers which were refused upon delivery for various reasons, and unit returned to Indianapolis Branch.

3—Rebilled on new Invoice No.—includes all units actually shipped to dealer and upon refusal of dealer to take same, was delivered to another dealer by the carrier on Ford's instructions.

4—(a) Changed from S/D to U. C. C.—includes units delivered to dealer and before accepting delivery from carrier, terms of sale were changed from sight draft to U. C. C. finance.

77

(b) Changed basis of note and payment—includes units delivered to dealer by carrier and before accepting delivery, dealer changed finance papers as to payment and amount, with approval of Ford and carrier.

The total changes in billings reflected above is approximately two per cent of the total billings.

(r) Witness Charles E. Volmer, chief clerk for the plaintiff at the Indianapolis branch, testified that there was no method by which it could be ascertained from the invoices themselves whether the car was refused by the dealer or rebilled for some other reason, and that there were several reasons for rebilling, including diversion by the car distributor before the car reached the dealer, or change in the method of financing at dealer's request; he stated that such information could be obtained only from the correspondence files, which, for the year 1937, had been destroyed pursuant to the company's regular practice. However, I find that the invoices themselves showed whether they were "voided" or "cancelled", being so

marked as to what was done with them; they also showed "Merchandise Returned Sales", that is, cases where units were shipped to a dealer from an out-of-state branch, which were refused upon delivery for various reasons and the unit returned to the Indianapolis branch—the exact reason for such return being shown on the driver's report; in such cases the invoice would generally have a notation "M.R.S.", with a number on it, which indicated it had been returned to the Indianapolis branch, although in some cases it was written out "Merchandise Returned Sales"; the invoices also showed cars that were rebilled on new invoice numbers, and those rebilled on same invoice where terms of sale were changed as to method of financing.

(s) In the seasons of the year when production may exceed demand, a few cars are built without specific dealer specifications, and there are held at the most convenient branch. Some reach the Indianapolis branch. Also, a few cars, as many as twenty-five to thirty, are used at
78 each branch by the representatives of the plaintiff, and when these cars have ten to twelve thousand miles on them, they are sold by the plaintiff as used cars. These cars may have such mileage in three to four months. Inventory records are kept at all the branches of not only the extra cars on hand, but if the cars in use by Company representatives. There are more than fifty-two different body color and style combinations of cars and trucks. Whenever dealers place orders for cars that are on hand at the branch, the order is immediately filled from the cars on hand instead of ordering a car to be assembled to fit the order. The effect is to keep the inventory of cars at a minimum in order to avoid carrying the investment in the car. The Indiana Gross Income Tax is always paid on all cars sold from those on hand at the Indianapolis branch except those shipped to Illinois dealers.

(t) All parts sold by plaintiff were shipped to dealers either (a) on open account, (b) C. O. D. or (c) with sight draft attached from the branch of plaintiff in whose territory the dealer was located. The parts were shipped by mail, express or truck as designated by the dealer. Parts in some instances are picked at the branch by dealers. The total gross receipts from part sales during the period involved from the branches involved were about 1.96% of plaintiff's total gross receipts from such branches.

(u) Remittances when received from dealers are deposited by the branch at a bank in the City where the branch is located to the credit of the plaintiff. The Dearborn office of the plaintiff from then on controls all funds so deposited.

(v) From January 1, 1935 up to dates hereinafter mentioned, the receipts for all cars and trucks delivered to dealers of the Indianapolis branch went back to the branch shipping the car, thus to either Dearborn, Chicago, Cincinnati or Louisville. No payments were received at
79 the Indianapolis branch. The Indianapolis branch received all remittances after September, 1936 on cars shipped from Dearborn after November, 1936 on cars shipped from Louisville, after January, 1937 on cars shipped from Chicago. Cincinnati was not supplying cars at that time, but as to cars subsequently supplied by Cincinnati, the remittances came to Indianapolis. The change in place of acceptance of remittances related only to cars delivered from out-state branches to dealers of the Indianapolis branch.

Finding No. Nine.

(a) Assembly plants of plaintiff receive shipments from Dearborn of all chassis parts, rear axles and motors which are shipped as assembled units, and body parts unassembled and unpainted. At the assembly plant, the bodies are assembled, painted, treated and upholstered, the chassis is assembled and the axle, motor and body mounted on the chassis. Chicago and Louisville are assembly plants as well as branches of the plaintiff. Cincinnati was an assembly plant operated until March 3, 1933, when it was shut down and operated only as a branch. It was reopened as a partial assembly plant, that is, for the assembly of chassis and the placing thereon of built up bodies shipped from Dearborn, from February, 1935 until May 27, 1937 when it was again shut down and has not since that time been operated except as a branch. Indianapolis was operated as an assembly plant and branch until December 15, 1932 when it was shut down and has not since been operated except as a branch.

(b) Modern car and truck assembly operations require single story assembly plants with sub and main assembly conveyor lines. Both Indianapolis and Cincinnati are old style "multiple story (four stories) buildings". The In-

dianapolis plant was designed for the building of Model T's, an early model of the plaintiff's car, which was much lighter and shorter and of simpler construction than its present V-8 Models which were produced from the years 1935 to 1939.

80 (c) Plaintiff kept on all of its assembly plants figures as to the efficiency of operation, based on operating costs and pay-roll hours per car assembled. In the year 1931, plaintiff was operating throughout the United States thirty-one assembly branches. As business during that year had regularly fallen off until many of the branches were assembling less than one hundred cars a day, Indianapolis at this time was building only 36 cars a day and operating on two or three days a week. A survey was made of the efficiency figures, and of the character of the plants, whether of the modern or of the multiple story type, and on the basis of this survey, twenty-four of plaintiff's assembly plants were closed. The only plants left in operation were Edgewater, New Jersey, Chester, Pennsylvania, Summerville, Massachusetts, Chicago, Illinois, Louisville, Kentucky, Kansas City, Missouri and Richmond, California, in addition, of course, to the River Rouge plant at Dearborn. The seven plants left in operation were all modern plants, and no four or six story plants were in the group. The seven were selected for their capacity, layout, location and adaptabality. At the time the Indianapolis plant was closed, it required 75 to 80 man hours per car for assembly there, and the assembly average of the seven plants left in operation was between 55 and 60 man hours per car. As requirements for automobiles increased subsequent to 1932, six additional assembly plants were reopened. The nearest to Indianapolis being so reopened were ones at Buffalo, New York and at St. Louis, Missouri. The plants so opened were selected on the basis of adaptability to construction of the new Ford V-8 car, plus the efficiency of the plant, i. e., its modern construction and its location to the market nearest the greatest demand for automobiles.

(d) Planitiff has never reopened the Indianapolis plant for the reason that the capacity of nearby assembly plants of greater efficiency is larger than the need in the mar-

81 ket area. In low capacity plants, such as Indianapolis (75 cars a day), the fixed overhead costs make production more expensive than at plants of large capacity, such

as Louisville and Chicago. Also, the Indianapolis plant is not adaptable to the V-8 cars that the plaintiff has built since 1933. The V-8 cars built since 1933 are so long that they can not be taken up and down the elevator shafts in the building. The Indianapolis assembly plant was sold in December, 1941.

(e) During the period covered by the tax in this suit, there was very little equipment in the plant; in fact, less than ten percent of the necessary equipment for the assembly of cars was available in the plant. To equip and prepare the plant for operation would cost at least $75,000.00, and the plant if operated would cost more to operate than any other plants in operation.

(f) The Indianapolis area is surrounded by modern plants of great capacity, and there was during this period no need for an assembly plant there.

Finding No. Ten.

(a) On July 1, 1938, a notice of proposed assessment of additional gross income tax for the years of 1935, 1936 and 1937 was mailed to plaintiff by defendant over the signature of the then Director of the Gross Income Tax Division of the Department of Treasure as follows:

For the period ending December 31, 1935, in the amount of $27,215.90

For the period ending December 31, 1936, in the amount of $20,027.97

For the period ending December 31, 1937, in the amount of $14,250.62;

with notice that interest at the rate of 1% per month from the date the tax was due, and penalty, would be added when final assessment was made.

82 The major cause of the additional assessment asserted by the department was due to the imposition of a tax upon gross receipts by plaintiff from sales where cars, trucks or parts were shipped directly from the plaintiff's factory at Dearborn, or from plaintiff's assembly plants at Chicago, Cincinnati, and Louisville, to dealers in Indiana who were assigned to such branches, and (1) where such products were paid for by such Indiana dealers in cash upon the delivery thereof at such dealers' place of business in Indiana, such payments having been made by such dealers to the employees of the truck-away or convoy companies upon delivery, and (2) where such products

were paid for by such Indiana dealers with finance papers, or a combination of finance papers, and cash, upon delivery thereof at the dealers' place of business in Indiana, such payments having been made by such dealers to the employees of the truck-away or convoy companies upon making such delivery, and in both instances the collections so received by the truck-away or convoy companies were by them taken and delivered in due course to the respective branches of the plaintiff aforesaid entitled to receive the same, were deposited by such branches in their regular depository as hereinbefore found, and were thereupon subject to the further order and disposition by the plaintiff as its property; these may be properly referred to as "Class A" sales.

Additional taxes were assessed at that time upon the basis of receipts charged by plaintiff to compensate itself for federal excise taxes collected from the plaintiff by the federal government, but specifically charged by plaintiff to and collected from its dealers, as well as certain other minor items not now involved in this action.

83 (b) The plaintiff also claims a refund on what it describes as "Class B" sales, which represents sales by the plaintiff to dealers in the Indianapolis branch territory in Indiana where shipment was made directly to such dealer either from plaintiff's factory and assembly plant at Dearborn or from its assembly plants at Chicago, Cincinnati or Louisville. Up to December 31, 1937, plaintiff voluntarily paid on regular quarterly returns the amount of tax on its gross receipts from such sales. After that date, and up until June 2, 1939, no tax was paid on such sales, but on that date, plaintiff filed its amended returns for the year 1938 and the first quarter of 1939, and voluntarily paid with interest the tax on its gross receipts from such sales. The tax was paid to stop the running of interest at the rate of one per cent per month in the event the Department assessed an additional tax on the gross receipts from such sales. At the time of this payment, plaintiff requested a refund of such tax. Plaintiff had previously requested a refund of the tax on the gross receipts from such sales paid voluntarily during the year 1935, 1936 and 1937. The tax so paid by plaintiff on its gross receipts from said "Class B" sales, refund of which is sought in this suit, with interest, was as follows:

	1936	1937	1938	1939 (1st Quarter)	Total
Tax	$2,079.62	$21,349.98	$7,371.15	$4,442.80	$35,243.55
Interest	256.22	1,397.98	294.85	66.64	2,015.69
					$37,259.24

(c) Within the time allowed by law and the regulations of the defendant department, and on July 28, 1938, the plaintiff filed written and verified objections to such proposed additional assessments referred to in paragraph (a) of this finding No. Ten for each of said years.

84 (d) Subsequently, following a hearing on September 7, 1938, the defendant department, over the signature of Elmer Marchino, a Hearing Member, on January 6, 1939, issued a ruling denying the objections of the plaintiff and directing the audit section to proceed with notice and demand for the additional tax.

(e) Under the date of January 7, 1939, a notice and demand for each of the periods for the additional tax assessed, plus interest, was issued and sent by registered mail to the plaintiff. The notice and demand required payment by January 17, 1939, of the following amounts of tax and interest:

	1935	1936	1937	Total
Tax	$27,215.80	$20,027.97	$14,250.62	$61,494.49
Interest	11,197.09	5,820.32	2,546.15	19,563.56
				$81,058.05

85 The demand for $81,058.05 was paid. Afterward items agreed upon by the parties as taxable, which are now immaterial, reduced the amount of the claim to the sum of $78,514.10, as stipulated by the parties in the stipulation prepared for trial of this cause, dated December 1, 1941, which stipulation is as follows: It is agreed that during the period from January 1, 1935 to December 31, 1937, the plaintiff has received gross receipts from the sale of cars, trucks and parts to dealers in Indiana of its Chicago, Illinois, Cincinnati, Ohio and Louisville, Kentucky branches, upon which additional tax and interest has been assessed as follows:

	1935	1936	1937	
Tax	$26,656.81	$19,901.31	$13,173.18	$59,731.30
Interest	10,854.72	5,591.95	2,336.13	18,782.80
				$78,514.10

This item of $78,514.10 was known and referred to by the parties in some of their discussions as the $78,000.00 claim, and was thus distinguished from the claim of $37,259.24, which was known and sometimes referred to by them as the $37,000 claim.

(f) Subsequently and within the time allowed by law and the Regulations of the Gross Income Tax Division of the Department of Treasury, and on January 17, 1939, the plaintiff paid the additional tax fixed in the notice and demand in the reduced amount of $78,514.10 as set forth above. Plaintiff also filed in the form required by law and by the Regulations, and at the same time, a petition for correction of the amount of the tax and refund of the excess tax for the years 1935, 1936 and 1937. In the petition, the plaintiff set forth objections not only to the principal
86 cause of the assessment but to the other minor causes.

The grounds of claim for refund of the principal amount of the additional assessment (the imposition of tax on the gross receipts from "Class A" sales) and also for the refund sought of the tax paid on gross receipts from "Class B" sales, were as follows: (1st) That the receipts were from commerce between the states, and under Section 8, Article I of the Constitution of the United States, the tax was void; (2) That the receipts were from transactions completed outside of the State and were not taxable under Section 1 (m) of the Gross Income Tax Act as amended, nor under Regs. 191 and 193 under the 1933 Act, and further, if such receipts were taxable, then the Act was in conflict with the Fourteenth Amendment to the Constitution of the United States; (3rd) All of the tax assessed on Class A sales for the year 1935 and that portion of tax for the year 1936 collected for the first three quarters was not assessed "at any time within two years after the time when the return covering such gross income was filed, and after due notice by registered letter, to the taxpayer", and such assessment for the aforesaid periods was therefore void. Plaintiff's refund petition also set forth as Exhibits schedules demonstrating certain errors in the original audit figures of the figures of the defendants which were attached to the notice of proposed assessment of July 1, 1938.

(g) Subsequently a supplemental audit was made on the basis of the schedules attached to the peittion for refund, and under the date of February 25, 1939 such sup-

plemental report was submitted to the Gross Income Tax Division, Department of Treasury, by the Audit Sec-
87 tion, and certain adjustments were made, indicating agreement in certain errors of the original audit of July 1, 1938, and allowing a $3945.16 refund (which sum was accepted wholly without prejudice to the rights of either party on the basis of over-assessment due in part to the adjustments and due also in part to the provision in the ruling of January 6, 1939 allowing the return of money assessed on account of cars where the dealer picked up the car at the outstate branch and paid for it there.

(h) On March 22, 1939, the Gross Income Tax Division of the Department of Treasury, over the signature of the Chief of the Audit Section, disallowed the plaintiff's petition for a refund of the amount of the tax and refund of the tax for the years 1935, 1936, and 1937, on both Class A and Class B sales, except upon the one point stated above.

(i) Subsequently, the plaintiff, in order to stop the running of interest, filed its amended annual return for the year 1938 and for the first quarter of the year 1939, reporting and paying tax on the gross receipts from Class B sales for such years. The tax and interest so paid at the time and sought by refund petition filed concurrently with the payment was in the amounts as follows:

	1938	1939 (1st Quarter)	Total
Tax	$7,371.15	$4,442.80	$11,813.95
Interest	294.85	66.64	361.49
			$12,175.44

Subsequently and on June 3, 1939, the Gross Income Tax Division of the Department of Treasury disallowed said petition and rejected the claim and refund in full. This sum of $12,175.44 is a part of the $37,259.24 reflected in Finding No. Ten above.

88 (j) The amount of the tax and interest assessed and paid, as stated in Finding No. Ten (e), which is asserted by the plaintiff under paragraph (d) on page 10 of its original complaint to have been assessed without right or authority for the reason that the defendants 'did not at any time within two years after the time when the return

covering such gross income tax was filed give due notice by registered mail to the plaintiff of such assessment', is in the amounts as follows:

	1935	1936 (1st Quarter)	1936 (2nd Quarter)	1936 (3rd Quarter)	Total
Tax	$27,215.90	$4,810.01	$6,949.48	$5,860.56	$44,835.95
Interest	11,197.09	1,587.30	2,084.84	1,582.34	16,451.57
Total					$61,287.52

89 Finding No. Eleven

The amounts sought to be recovered in this action, together with the amounts of interest collected thereon, also sought to be recovered for the respective periods, are as follows, to-wit:

	1935	1936	1937	1938	1939 (1st Quarter)	Total
Tax	$26,656.81	$21,980.93	$34,523.16	$7,371.15	$4,442.80	$94,974.85
Interest	10,854.72	5,848.17	3,734.11	294.85	66.64	20,798.49
						$115,773.34

Plaintiff, within one year prior to the institution of this action, filed with the Department of Treasury petition for refund in proper form seeking to recover all of the foregoing tax and interest. Prior to the commencement of this action the defendant, the Department of Treasury, had denied said petition for refund and had notified plaintiff thereof in writing. Defendants have refused to pay the plaintiff said tax and interest so assessed and which the plaintiff has been required to pay. Plaintiff has taken all of the steps required by law to be taken before the filing of this suit for refund, and said suit has been filed in the manner and within the time allowed by law, the complaint having been filed on June 7, 1939.

90 Finding No. Twelve

As of November 25, 1940, the plaintiff by letter written and signed by its counsel, requested a rehearing on its petition for refund theretofore filed, stating in such request that the case was set for a pre-trial conference in the Federal Court on the following day: that preliminary conferences between counsel for plaintiff and the Attorney General's office had developed a situation which counsel for plaintiff believed merited the reconsideration of the case; that facts not known to counsel for plaintiff at the time the

matter was presented to the Department, presented, in the opinion of such counsel, an entirely different legal situation.

Said request for a rehearing was granted by the Department.

Finding No. Thirteen

(a) On November 26, 1940, at a pre-trial conference in this case, at the suggestion of Joseph P. McNamara, Deputy Attorney General representing the defendants, this case was continued in order that it might be reconsidered by the Department of Treasury, but was reassigned for trial on March 24, 1941.

(b) Subsequently, and in December, 1940, and January, 1941, Joseph P. McNamara and Elmer F. Marchino, Hearing Judge for the Department of Treasury, went with the plaintiff's Attorney to plaintiff's branch at Louisville,
91 Kentucky, and its home office at Dearborn, Michigan, to make a further investigation of the facts on hearing. The Department had before it all of the information in its audit file from the audit made prior to July 1, 1938, and the supplemental audit made under the date of February 25, 1939, which audits were extensive. All records of the Company at all of its branches and at its home office were available to the Auditors for those audits. Subsequently, in January of 1941, McNamara, in talking with Mr. Ice, attorney for the plaintiff, expressed as his opinion the position that the tax sought to be refunded in the case, should be refunded. He said further that he felt this was Marchino's view, but that one difficulty was that Marchino would have to in effect reverse himself. Ice suggested that the additional information developed at Louisville and at Dearborn in December, 1940, and January, 1941, was not presented at the time of the hearing on the notice of proposed assessment in 1938, and that perhaps a letter to Mr. Marchino setting out these as new facts would help. McNamara stated that he thought it would, and subsequently such a letter was written. In the letter written on January 10, 1941, to Marchino pursuant to this conversation, counsel for the plaintiff stated that they had always made it a practice to reveal all of the facts known to them to the Department at the time of the hearing of the case; that upon the question of facilities, there was further detail
92 in the testimony that developed from the trip to Louisville, and Dearborn with McNamara and Mar-

chino that they did not have at the time of the hearing; that they did not know the precise manner in which the cars were ordered, how the orders were completely filled, and how cars were all signed for, even to finance papers, at the gates of the company at Cincinnati, Louisville, Dearborn and Chicago; that they had the general outline of this picture which was presented at the hearing, but the details, which are important in these cases, did not become apparent until the meeting with the officials at Louisville a day or two prior to the time that you (Marchino and McNamara) came down to Louisville; that it was at this meeting that these authorities to sign title papers and the other matters came to light,—such as the placing of the invoices on the cars ordered three days before, before those specific cars were off the end of the assembly line.

(c) At a conference at the Department of Treasury in the office of Mr. Marchino on February 4, 1941, Mr. Marchino and Mr. McNamara stated to the attorney for the plaintiff that they thought that the money should be refunded, and that they were ready to write an opinion to that effect.

(d) Upon granting such re hearing, a method had to be devised to get the matter back before the Department, as it had disposed of it on the previous hearing by ruling against the plaintiff; plaintiff's attorney, Mr. Ice, suggested that judgment be entered in the case; Mr. McNamara said they would prefer that there wouldn't be any record in court, and either Marchino or McNamara suggested that plaintiff's attorney write a letter to the
93 Department requesting a rehearing, and that such letter be dated back prior to the pre-trial conference of November 26, 1940, and the Department would then proceed to issue a new opinion; this letter was written on February 4, 1941, dated back to November 25, 1940, and is the letter referred to, and the substance of which is set out, in Finding No. Twelve.

(e) Marchino, McNamara and Mr. Ice, at that time discussed at some length the method of handling the procedure from there on out; the theory on which a refund was to be made, as Mr. Ice understood it, was that the sales were delivered at the outstate branches, and Marchino and McNamara pointed out that that meant a tax on the sales from the Indianapolis Branch into Illinois, if they were handled the same way; Ice told them he didn't know whether they

were handled the same way, but he would find out from the Indianapolis Branch Manager and give them a letter as to how those were handled; Marchino and McNamara then said that after the ruling had been given to Marchino, it would be necessary to make an audit of part of the figures. Mr. Ice agreed with them that the $37,000 claim had never been, but had to be, audited, and pointed out to them, and they agreed, that the $78,000 part of the claim had been audited and those figures agreed upon at the time it was paid.

(f) On February 5, 1941, Mr. Hewit, of the Department, called Mr. Ice by telephone and said he knew what Marchino and McNamara were planning with reference to the refund and wanted to know whether plaintiff paid net income tax in Kentucky on sales out of the Louisville Branch into Indiana; he said that the refund that would be made here was a very large one and he wanted to feel that he was on sound ground on it; when told a day or so later by Mr. Ice that plaintiff did take into the base, for determining its net income the Kentucky tax on the Kentucky sales into
94 Indiana to dealers of the Louisville Branch in Indiana, Mr. Hewitt said, "I feel relieved about that. This is a very large refund and that confirms the position of the Department, doesn't it?"

(g) Elmer F. Marchino, as the Hearing Judge of the Department, issued and furnished to the plaintiff two different written orders bearing upon the question of the right of plaintiff to such refund, one dated January 6, 1939, and one dated March 1, 1941; omitting salutation and signature, each thereof is as follows:

January 6, 1939.

"Reference is being made to the formal hearing which was held in the offices of the Gross Income Tax Division in the matter of the above named taxpayer corporation on September 7, 1938. This hearing was occasioned by the taxpayer's objections to the proposed additional assessment of gross income tax, which was made and contained in a Notice of the Department, issued under date of July 1, 1938. According to the facts submitted, the Ford Motor Car Company was incorporated under the laws of the State of Delaware, and is engaged in the manufacture and sale of Ford automobiles, tractors, various accessories and

supplies for automobiles and tractors. The taxpayer corporation maintains various branches for the distribution of its products, both within and without the State of Indiana. The principal branch office in Indiana, is maintained at Indianapolis, Indiana. Certain out-of-state branch offices, serving portions of Indiana territory are located at Louisville, Kentucky, Chicago, Illinois and Cincinnati, Ohio. Each branch has its trading area from which the supply of its products are made to various dealers throughout that area.

The principal causes of the proposed additional assessment of gross income tax, resulted from the inclusion by the examiner of the entire gross receipts derived from the sale of this taxpayer's products to Indiana customers made from Indiana branches and out-of-state branches. The
95 auditor has also included in taxable income and disallowed a deduction taken for gross receipts representing Federal Excise taxes.

At the time of the hearing, the taxpayer objected to the inclusion of gross receipts derived by out-of-state branches from sales made to customers within the State of Indiana, contending that such transactions constituted transactions made in interstate commerce, and the gross receipts therefrom were not properly taxable under the provisions of the Gross Income Tax Law.

To this contention the Department cannot agree. The Department takes the position that the gross receipts of this taxpayer corporation derived from sales made to Indiana resident customers, where facilities exist in Indiana, for making supply of the products to such Indiana customers, even though such products are supplied and shipped from branches outside the State of Indiana are intrastate in character, and the gross receipts therefrom are properly taxable under the provisions of the Gross Income Tax Law. The Department also takes the attitude that it is not material as to the place of receipt of the payment for the products.

In this connection, the Department acknowledges the deductibility of gross receipts derived from a transaction wherein the Indiana customer makes purchase of products at this taxpayer's place of business outside the State of Indiana. The transaction being completed in its entirety outside the State of Indiana. This taxpayer does not have the obligation or the option, under the terms of the sale, to

make supply of the products from any other branch, or to transport or initiate the transportation of the products across state lines. The transaction is intrastate in character and completed at a business situs outside the State of Indiana.

The taxpayer also made objection generally to the proposal of the Department to make the assessment, as
96 proposed, for the calendar period of 1935 final in the matter, offering as a basis for his objection, the two year period of limitations contained in the Act, and that, therefore, the Department was without authority to make the assessment proposed final at this time.

To this contention the Department could not agree, calling attention to the fact that the Gross Income Tax Law was amended and became effective as of April 1, 1937. Under the provisions of the amended Act, the period of limitations was extended to three years. It is the attitude of the Department, that where the two year period of limitations had not expired prior to the becoming effective of the amended Act, then the period of limitations is extended for the additional period. Consequently, the Department has the authority to include in taxable consideration the calendar of 1935, and is not prohibited from making the assessment final for that period.

The Audit Section of this Department will proceed to issue a Notice and Demand for the tax found to be due in conformity with the terms of this letter of findings."

March 1, 1941.

"Reference is being made to the application of the Ford Motor Car Company for refund of certain amounts of gross income tax paid for the annual calendar periods of 1935, 1936 and 1937. This application for refund was filed on January 17, 1939, and after giving the application careful consideration the application was denied under date of March 2, 1939.

On November 25, 1940, the taxpayer corporation, through its attorney, submitted a petition for a reconsideration of the Department's denial of its claim for refund and requested a rehearing in the matter. The request for a reconsideration and a rehearing was based upon the contention of the taxpayer corporation that the transaction con-

cerning the sale of products manufactured or as-
97 sembled by this taxpayer corporation at points outside of the State of Indiana, and there delivered to Indiana customers within the territorial limits of that outside branch or assembly plant constituted a transaction completed in its entirety outside of the State of Indiana, and thus did not fall within the purview of the Gross Income Tax Act.

The Department acquiesced to the taxpayer corporation's petition, and conferences concerning this matter were held with the officials of the taxpayer corporation's assembly plant at Louisville, Kentucky, on December 20, 1940, and with the executive staff of the taxpayer corporation's main office at Dearborn, Michigan, on January 7, 1941.

At these conferences evidence was presented to show that the Ford Motor Car Company, accepts orders for its products from Indiana customers. These Indiana customers are for the most part retail automobile dealers. The Ford Motor Car Company will make delivery of such automobiles to the Indiana customers or to their authorized agents at the delivery gate of its out-of-State manufacturing plant or assembly plant. Deliveries of the products desired by Indiana customers are made under conditions whereby the Ford Motor Car Company, at the time of the delivery to the customers or the customers authorized representatives, will be paid for the products, or appropriate financing will be arranged for by the customers or by their authorized agents.

It is further disclosed that the Ford Motor Car Company in regard to sales made to Indiana customers resident within the territorial jurisdiction of the outside manufacturing and assembling plants does not have the obligation or the responsibility, under the terms of the sale, to make delivery of the products desired by Indiana customers to
those customers across State lines, nor does any obli-
98 gation or responsibility to initiate such transportation across State lines exist. It is indicated that the entire responsibility of the Ford Motor Car Company to the customer ceases at the time of delivery of the products to the Indiana customers or to their authorized representatives at the delivery gate of the manufacturing or assembling plants outside of the State of Indiana.

It is, therefore, indicated that such a transaction is completed at a business situs entirely outside of the State of

Indiana, and that such a transaction is not a transaction made in interstate commerce, and that the question of facilities is not existent in this transaction.

The Department will accordingly take the necessary steps to make refund of the gross income tax paid on the transaction outlined above. This file will be remanded to the Refund Section of this Department for further handling."

99 (h) On March 5, 1941, counsel for plaintiff wrote a letter to Judge Baltzell, which, omitting salutation and signature, is as follows:

(Exhibit 9)

"The above case is set for trial on March 21. At the time of the pre-trial conference when the case was re-set, you will recall that the parties advised your Honor that there was a possibility of a refund of the taxed involved in this suit to the taxpayer.

In order not to disturb your trial calendar at too late a date, we wish to advise you now that on the 1st day of March, 1941, the Department of Treasury by its Hearing Judge, upon a reconsideration of the assessment involved in this case, ordered a refund following an audit of all of the tax sought to be recovered in the above action.

The only remaining steps are an audit to determine the amounts to be refunded, and the actual issuance of a warrant on the refund.

The plaintiff will dismiss the above case as soon as the warrants on the refund are drawn. We are advising you of the steps taken to date in this case and sending a carbon of this letter to the Attorney for the Department of Treasury in order that you may now remove this case from the trial calendar on March 21."

A copy of such letter was sent to Mr. McNamara.

(i) Thereafter, and before the trial date on March 24th, 1941, Mr. McNamara and Mr. Ice went to the office of Judge Baltzell and McNamara informed the Judge that the case had been settled and would not need to be tried on the 24th of March; the case was then taken off the trial calendar.

100 (j) Around the first of April, Marchino called Ice and said that Mr. Kennedy, the Head of the Audit Department, would like to go down to Louisville and verify

some of the facts given to them by Mr. Henry and Mr. Wright in December. Ice arranged for the trip, and Marchino, Kennedy and Gage went to Louisville on April 18, 1941, and reviewed what had been covered in December. Later, Marchino, Kennedy and Gage went with Ice to Dearborn, and there talked with Skinner, Wiesmeyer and Moffitt on the same facts that had been presented in January.

(k) On May 5, 1941, this case was called on the Federal Court docket, and, in open court, Mr. McNamara, in the presence of Mr. Ice, said to the court that the case had been settled and refund was to be made as soon as an audit could be completed of some figures; the case was then passed, without action, but Judge Baltzell stated that he would like to have it disposed by the 1st of July. On May 6, 1941, Mr. Kennedy, Chief of the Audit Division, directed a memo to Mr. Gage instructing him to proceed with the audit of figures at Louisville and attaching a form of working sheet to secure information 'required to contest any questions now involved in the refund suit pending in Federal Court'.

(l) About June 30, 1941, inquiry was further made by the Judge as to the disposition of the case, and Mr. McNamara said that the audit was well on its way to completion and he thought it was just a matter of a few days until it would be completed, and when it was completed, they would be able to make the refund.

(m) Counsel had another conference in September in the presence of the Judge, and again Mr. McNamara said to him that the audit was not complete but that it would be shortly. After McNamara and Ice left the Judge's office at this conference, McNamara told Ice that the situa-
101 tion at the Department was then such that the case would probably have to be tried; that after Mr. Kennedy got into it, there had developed some disagreement in the Department after the order had been given by Mr. Marchino; this was the first time that McNamara had told Ice that the case would have to be tried.

(n) No notice has ever been served on plaintiff, or its counsel, of the rescinding of the order issued by Mr. Marchino of March 1, 1941, and such order has never been rescinded.

(o) None of the representatives of the defendants ever stated to the plaintiff, or its counsel, that the Department

would refund to the Ford Motor Company $78,514.10, or any other specifically designated amount.

(p) Marchino's order of March 1 indicates that the Department would take the necessary step to make refund of the gross income tax paid on transactions outlined in such order. Defendants did not know what plaintiff's gross income from such transactions was when said order was issued, nor until such audit was completed, and plaintiff and defendants understood that on the 1st day of March, 1941, the Department of Treasury, by its Hearing Judge, upon a reconsideration of the assessment involved in this case, ordered a refund following an audit of all of the tax sought to be recovered in this action.

Finding No. Fourteen.

That the audit made after the ruling of March 1, 1941, was not completed until December 1, 1941. That the audit indicated that a further refund should be made on one item of $10,267.45 of gross receipts of tax at the rate of ½ of 1% in the amount of $25.67 to the Ford Motor Company; that this figure represented sales where merchandise is one hundred per cent financed at an out-of-state branch; that the item of tax in this latter amount was included with the item of tax found to be due and refundable under the 102 opinion of January 6, 1939, set out in Finding No. Thirteen, which total sum of refund has been accepted without prejudice to the rights of either party as stated elsewhere in this finding.

Finding No. Fifteen.

At no time did defendant or any of its attorneys, agents or employees promise plaintiff that the sum of $78,514.10, or any other specifically stated amount would be refunded to plaintiff. No certificate of over-assessment was issued to plaintiff by defendant at any time.

Finding No. Sixteen.

During the period from January 1, 1935 to December 31, 1937, the plaintiff received gross receipts from the sale of cars, trucks and parts to its dealers in Indiana assigned by it to Chicago, Illinois, Cincinnati, Ohio, and Louisville, Kentucky, branches, upon which additional tax and interest has been assessed by the Department and paid by the plaintiff, the taxes and interest so assessed and paid being as follows:

(Class A—Finding No. Ten)

	1935	1936	1937	Total
Tax	$26,656.81	$19,901.31	$13,173.18	$59,731.30
Interest	10,854.72	5,591.95	2,336.13	18,782.80
				$78,514.10

That during the period from January 1, 1936, to April 15, 1939, the plaintiff received gross receipts from the sale of cars, trucks and parts to its dealers in Indiana assigned by it to its Indianapolis branch, where the cars, trucks and parts were delivered directly to the dealers either from Dearborn, Michigan, Chicago, Illinois, Cincinnati, Ohio, or Louisville, Kentucky, upon which tax and interest has been assessed by the Department and paid by the plaintiff, as follows:

103 (Class B—Finding No. Ten)

	1936	1937	1938	1939 1st Quarter	Total
Tax	$2,079.62	$21,349.98	$7,371.15	$4,442.80	$35,243.55
Interest	256.22	1,397.98	294.85	66.64	2,015.69
					$37,259.24

These are the amounts which the plaintiff seeks to recover by this suit, and aggregate the sum of $115,773.34 as set out in Finding No. Eleven. None thereof has been refunded to the plaintiff; proper demand was made by plaintiff of defendants for the refund thereof within the time allowed by law and before the commencement of this action.

Finding No. Seventeen.

(a) I find that all of the cars, trucks and parts referred to in Finding No. Sixteen thus sold by plaintiff to its dealers in Indiana, were transported either from Dearborn, in the State of Michigan, or Chicago, in the State of Illinois, or Louisville, in the State of Kentucky, or Cincinnati, in the State of Ohio, and delivered to such Indiana dealers, in the State of Indiana; the transportation or delivery charges were paid in the first instance by the plaintiff to such carriers, with the agreement and understanding on the part of the plaintiff and such carriers that the carriers should collect the purchase price of such products, and such

delivery charges, and a sum equivalent to any tax imposed by any law of the United States or of any of the States upon the manufacture or sale of any of such articles, and any excise or other taxes or fees which might be imposed upon such products, or on account of such business, or on Dealer's stock, or plaintiff's products in transit to Dealers, from such dealers in Indiana concurrently with the delivery of such products to such dealers in Indiana; the title to such products was to and did remain in the plaintiff until the purchase price, and all said charges
104 thereon which were agreed to as between the plaintiff and such dealers, had been actually paid by such dealers; upon such payment the title to said products concurrently passed to said respective dealers, and said products thereupon came to rest insofar as interstate commerce and transportation were concerned; that for the purpose of expediting and facilitating the delivery of said products, and the collection of the purchase price and charges thereon where the dealer desired to finance the same, employees of said truck-away and convoy companies were given written authority directed to a particular finance company by such dealers to execute or endorse in behalf of such dealer, notes, acceptances, contracts and all other instruments or assignments thereof used in connection with such financing, and in many instances such employees acted for and on behalf of such dealers in the execution of such finance papers and acted as the agent of such dealers in relation thereto; that said truck-away and convoy companies acted as carriers for the purpose of transporting and delivering such products to such dealers in Indiana, and acted as the agent of the plaintiff for the purpose of collecting the purchase price and all charges thereon from such dealers in Indiana, and for the further purpose of transmitting and delivering such collections from the dealers in Indiana to the respective branches of the plaintiff entitled to receive the same; that with the knowledge and consent of plaintiff they acted as the agents of the dealers in the execution of the finance papers aforesaid, and which enabled them to collect in Indiana, for and on behalf of the plaintiff,
105 the cash or certified check for the full amount due on such products as directed and required by the plaintiff before the delivery of such products to said dealers.

(b) All of the gross receipts from the sale of cars, trucks and parts by plaintiff to dealers in Indiana, upon

which the taxes and interest were assessed and collected as shown in Finding No. Sixteen, were received by plaintiff while it was engaged in business in Indiana, and derived from sources within Indiana, from the sale and transfer of plaintiff's property which was thus transported to its Indiana dealers as aforesaid, and paid for by such Indiana dealers in cash upon arrival at their places of business in Indiana, or were paid for upon arrival at the place of business of such dealers in Indiana with finance papers executed as aforesaid, or a combination of cash and finance papers, collection having been made in both instances by the employees of said truck-away or convoy companies acting as the agent for the plaintiff in the making of such collections, and who, thereafter, in due course transmitted such receipts and collections to the respective branches of plaintiff entitled to receive the same.

106 Finding No. Eighteen.

(a) A third class of sales referred to as 'Class C' sales covers sales made of cars, trucks and parts shipped out of stock of the Indianapolis branch to dealers located in Indiana. The plaintiff has regularly filed returns within the time allowed and paid tax on the gross receipts from these sales. No refund is sought of such tax. All of the cars supplied for such sales were assembled outside of the State of Indiana and delivered to the Indianapolis branch from such outside points. The tax so paid on Class C Sales, no refund of which was sought was as follows:

1935	1936	1937	1938	1939 (1st Quarter)	Total
$24,176.90	$22,491.51	$15,111.18	$10,338.92	$3,506.70	$75,825.21

(b) The fourth class of sales, referred to for brevity as 'Class D' Sales, represents shipments made out of the cars, trucks or parts on hand at the Indianapolis branch to dealers of that branch located in the State of Illinois. No tax has ever been paid on the gross receipts from such sales. None has ever been assessed.

/s/ Robert C. Baltzell,
Judge.

Feb. 10, 1943.

Upon the above and foregoing Findings of Fact the Court now states its Conclusions of Law as follows:

Conclusions of Law.

Conclusion No. One.

The Court concludes for the defendants that the taxes for the year 1935 and for the first three quarters of 1936 were assessed and collected within the time required and allowed by law.

167 Conclusion No. Two.

The Court concludes for the defendants that no account stated arose between plaintiff and defendants.

Conclusion No. Three.

The Court concludes for the defendants that the tax assessed and collected on the basis of gross receipts from "Class A" transactions is not prohibited either by Article I, Section 8 of the Constitution of the United States or by the Fourteenth Amendment to the Constitution of the United States, and that such tax was lawfully assessed and collected by defendants.

Conclusion No. Four.

The Court concludes for the defendants that the tax assessed and collected on the basis of gross receipts from "Class B" transactions is not prohibited either by Article I, Section 8 of the Constitution of the United States or by the Fourteenth Amendment to the Constitution of the United States, and that such tax was lawfully assessed and collected by defendants.

Conclusion No. Five.

The Court concludes for the defendant that the law is with the defendants and against the plaintiff, and that plaintiff should not recover in this action.

Conclusion No. Six.

The Court concludes for the defendants that they should recover their costs from plaintiff.

Dated this 10 day of February, 1943.

/s/ Robert C. Baltzeli,
Judge.

108 (Entry for February 10, 1943, continued.)

It Is Therefore Considered And Adjudged by the Court that plaintiff recover nothing in this action, and that the defendants recover of and from the plaintiff their costs herein taxed at $

It Is Further Ordered And Adjudged by the Court that Albert Ward be and he is hereby allowed the sum of $750.00 for his services as Special Master herein, which said sum is to be taxed as costs to be paid by plaintiff.

109 And afterwards to wit at the November Term of said Court on the 14th day of April, 1943, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Comes now the plaintiff by its attorneys and files motion to set aside judgment, for restatement of Conclusions of Law and Judgment accordingly, which motion is as follows: (H. I.)

110 And afterwards to wit at the November Term of said Court on the 24th day of April, 1943, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Plaintiff files herein petition to vacate the judgment entered in this cause so that the Court may reconsider its decision, and the Court being duly advised now orders that the prayer of the plaintiff's petition this day filed be allowed, and that the judgment heretofore entered in said cause be and the same is hereby vacated and set aside, as prayed for in plaintiff's said petition.

111 And afterwards to wit at the May Term of said Court on the 30th day of June, 1943, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

This cause coming on for further hearing, the plaintiff being represented by James A. Ross, its counsel, and the defendants, being represented by David I. Day, Jr., and

Byron B. Emswiller, their counsel, the Court now denies and overrules the motion of plaintiff filed on April 14, 1943 to set aside the judgment and to restate its conclusions of law and judgment.

And it appearing that the Court on April 24, 1943, upon petition of plaintiff, entered an order vacating the judgment theretofore entered pending the decision in the State Court of the case of Department of Treasury, et al. *vs.* International Harvester Company, et al., and it appearing that the decision in said case now has been made final this Court does now proceed to render judgment in this cause upon the findings of fact and conclusions of law heretofore found and made by the Court on February 10, 1943.

It is therefore considered and adjudged by the Court that plaintiff recover nothing in this action and that defendants recover of and from plaintiff their costs herein taxed at $ .....

112 And afterwards to wit at the May Term of said Court on the 30th day of August, 1943, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Come now John J. McShane and Winslow VanHorne, deputy attorney generals and file appearance in place of Joseph P. McNamara, David I. Day, Jr., and Byron B. Emswiller, which appearance is as follows:

113 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—117) * *

APPEARANCE.

The undersigned, Deputy Attorneys Generals of the State of Indiana, hereby enter their appearance in said court in the place and stead of Joseph P. McNamara, David I. Day, Jr., and Byron B. Emswiller.

/s/ John J. McShane,
/s/ Winslow Van Horne.

114 And afterwards to wit at the May Term of said Court on the 1st day of September, 1943, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Comes now the plaintiff by its attorneys and files notice of appeal, which notice is as follows:

115 IN THE DISTRICT COURT OF THE UNITED STATES.

For the Southern District of Indiana,

Indianapolis Division.

Ford Motor Company, *Plaintiff*, *vs.* Department of Treasurey of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and constituting the Department of Treasury of the State of Indiana, *Defendants.*	Civil Cause No. 117.

NOTICE OF APPEAL.

Notice is hereby given that Ford Motor Company, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Seventh Circuit from the final judgment of the Court in this cause to the effect that plaintiff take nothing in the action, which judgment was entered on June 30, 1943.

/s/ Ross, McCord, Ice & Miller,
/s/ Jas. A. Ross,
Attorneys for Plaintiff-Appellant, Ford Motor Company.

951 Consolidated Building,
Indianapolis, Indiana.

State of Indiana, } ss.
County of Marion. }

James A. Ross, being first duly sworn, upon his oath deposes and says that he is one of the Attorneys for Plaintiff-Appellant, Ford Motor Company; that on the 1st day of September, 1943 he mailed to the Attorneys for all of the Defendants-Appellees a copy of the foregoing Notice of Appeal.

And further affiant saith not.

/s/ Jas. A. Ross.

Subscribed and sworn to before me this 1st day of September, 1943.

/s/ Wilma Pendergast,
(Seal) *Notary Public.*

My Commission Expires: Jan. 19, 1946.

116 (Entry for September 1, 1943, continued.)

The plaintiff also files statement of points, which is as follows:

117 In the District Court of the United States.

* * (Caption—117) * *

STATEMENT OF POINTS.

(Filed Sept. 1, 1943.)

Plaintiff-appellant, pursuant to Rule 75(d) of the Rules of Civil Procedure for District Courts of the United States now makes this concise statement of the points on which plaintiff-appellant intends to rely on the appeal.

Plaintiff, as appellant on appeal, will rely upon the following points as supporting its contention that the Court committed error in its conclusions of law and in the entry of judgment on June 30, 1943 against plaintiff-appellant denying the plaintiff-appellant recovery as sought in the complaint, as amended, and the supplement thereto.

Point One. Plaintiff-appellant should have recovered the sums sought in paragraph 5(a) of the complaint, as amended, since such receipts were derived from activities, businesses and sources outside of the State of Indiana

under the provisions of Section 2 of the "Gross Income Tax Act of 1933" and as amended in 1937,* and were therefore not taxed under the Act.

Point Two. Plaintiff-appellant should have recovered the sums sought in paragraph 5(a) of the complaint, as amended, since such receipts were derived from activities, businesses and sources outside of the State of Indiana under the provision of Section 2 of the "Gross Income Tax Act of 1933" and as amended in 1937, and were therefore not taxed under the Act. The District Court in denying recovery on said ground failed to follow the binding construction of Section 2 of the "Gross Income Tax Act of 1933" by the Supreme Court of the State of Indiana, holding that such receipts were derived from activities, business and sources outside of the State of Indiana, and were therefore not taxable under the Act.

Point Three: Plaintiff-appellant should have recovered the sums sought in paragraph 5(a) of the complaint, as amended, since such receipts were derived from activities, businesses and sources outside of the State of Indiana under the provisions of Section 2 of the "Gross Income Tax Act of 1933' and as amended in 1937; and the imposition of a tax upon such receipts constitutes a denial to plaintiff-appellant of the due process of law, and such tax is illegal and void as being in conflict with the Fourteenth Amendment of the Constitution of the United States.

Point Four: Plaintiff-appellant should have recovered the sums sought in paragraph 5 (b) of the complaint, as amended, since such receipts were derived from activities, businesses and sources outside of the State of Indiana under the provisions of Section 2 of the "Gross Income Tax Act of 1933' and as amended in 1937, and were therefore not taxed under the Act.

Point Five. Plaintiff-appellant should have recovered the sums sought in paragraph 5(b) of the complaint, as amended, since such receipts were derived from activities, businesses and sources outside of the State of Indiana under the provisions of Section 2 of the "Gross Income Tax Act of 1933" and as amended in 1937, and were therefore not taxed under the Act. The District Court in denying recovery on said ground failed to follow the binding

* Ch. 50, Acts of Indiana 1933, amended by Ch. 117, Acts of Indiana 1937. Referred to herein as above indicated.)

construction of Section 2 of the "Gross Income Tax
119 Act of 1933" by the Supreme Court of the State of Indiana, holding that such receipts were derived from activities, businesses and sources outside of the State of Indiana, and were therefore not taxable under the Act.

Point Six. Plaintiff-appellant should have recovered the sums sought in paragraph 5(b) of the complaint, as amended, since such receipts were derived from activities, businesses and sources outside of the State of Indiana under the provisions of Section 2 of the "Gross Income Tax Act of 1933" and as amended in 1937; and the imposition of a tax upon such receipts constitutes a denial to plaintiff-appellant of the due process of law, and such tax is illegal and void as being in conflict with the Fourteenth Amendment of the Constitution of the United States.

Point Seven. Plaintiff-appellant should have recovered the sums sought in paragraph 5(a) of the complaint, as amended, for the reason that the sums represent a tax imposed upon receipts derived from business conducted in commerce between the State of Indiana and other States of the United States, which, under the terms and provisions of Section 6(a) of the "Gross Income Tax Act of 1933" is exempt from taxation.

Point Eight. Plaintiff-appellant should have recovered the sums sought in paragraph 5(a) of the complaint, as amended, for the reason that the sums represent a tax imposed upon receipts derived from business conducted in commerce between the State of Indiana and other States of the United States, and if said receipts are not exempt under the provisions of Section 6(a) of the "Gross Income Tax Act of 1933", then said tax is invalid and void as to such receipts for the reason that the tax constitutes a regulation of and a burden upon commerce between the State of Indiana and other States of the United States in conflict with Article I, Section 8 of the Constitution of the United States.

Point Nine. Plaintiff-appellant should have recov-
120 ered the sums sought in paragraph 5(b) of the complaint, as amended, for the reason that the sums represent a tax imposed upon receipts derived from business conducted in commerce between the State of Indiana and other States of the United States, which, under the terms and provisions of Section 6(a) of the "Gross Income Tax Act of 1933" is exempt from taxation.

Point Ten. Plaintiff-appellant should have recovered the sums sought in paragraph 5(b) of the complaint, as amended, for the reason that the sums represent a tax imposed upon receipts derived from business conducted in commerce between the State of Indiana and other States of the United States, and if said receipts are not exempt under the provisions of Section 6(a) of the "Gross Income Tax Act of 1933", then said tax is invalid and void as to such receipts for the reason that the tax constitutes a regulation of and a burden upon commerce between the State of Indiana and other States of the United States in conflict with Article I, Section 8 of the Constitution of the United States.

Point Eleven. Plaintiff-appellant should have recovered the sums sought in paragraph 5(d) of the complaint, as amended, since the sums therein referred to represent a tax upon receipt of gross income which accrued under the provisions of the "Gross Income Tax Act of 1933" prior to the effective date of the amendment of 1937 (April 1, 1937), and such assessment of the said tax was not made within two years from the time provided in Section 12(d) of said "Gross Income Tax Act of 1933".

Point Twelve. Plaintiff-appellant should have recovered the sums sought in the supplemental complaint since there arose between the plaintiff and defendant Department of Treasury an account stated for the sums referred to in said supplemental complaint.

/s/ Ross McCord Ice & Miller,
/s/ Jas. A. Ross,
Attorneys for Plaintiff-Appellant Ford Motor Company.

121 951 Consolidated Building
Indianapolis, Indiana.

Service of copy of the foregoing statement of points upon defendants-appellees is acknowledged this 1st day of September, 1943.

/s/ John J. McShane,
/s/ Winslow Van Horne,
Attorneys for Defendants-Appellees.

122 (Entry for September 1, 1943, continued.)

The plaintiff also files appeal bond in the sum of Two Hundred Fifty Dollars ($250.00) with New Amsterdam Casualty Company as surety thereon, which bond is as follows:

123 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—117) * *

APPEAL BOND.

(Filed Sept. 1, 1943.)

Know All Men By These Presents, That we, Ford Motor Company, as Principal, and New Amsterdam Casualty Company, as Surety, are held and firmly bound unto Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and constituting the Department of Treasury of the State of Indiana, as appellees, in the full and just sum of Two Hundred Fifty Dollars ($250.00) to be paid to said appellees, their successors or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, severally by these presents.

Sealed with our seals and dated this 1st day of September, 1943.

Whereas, there was rendered at the May Term of the United States District Court for the Southern District of Indiana, Indianapolis Division, in a suit pending in said Court between Ford Motor Company, plaintiff, and Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and constituting the Department of Treasury of the State of Indiana, defendants, a judgment against said plaintiff on the 30th day of June, 1943, and the said
124 plaintiff has duly filed a notice of an appeal from said judgment to the United States Circuit Court of Appeals for the Seventh Circuit.

Now therefore, the condition of the above obligation is such that if the said Ford Motor Company shall prosecute this appeal to effect and pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award with the judgment being modi-

fied, then the above obligation is to be void, otherwise to remain in full force and effect.

Ford Motor Company,
By /s/ Jas. A. Ross,
Attorney.

Countersigned By:

(Seal)

/s/ New Amsterdam Casualty Company,
/s/ by David Layton,
Attorney-in-Fact.

(Corporate Seal)

125 (Entry for September 1, 1943, continued.)

The plaintiff also files designation of contents of record on appeal, which designation is as follows:

126 In the District Court of the United States.

* * (Caption—117) * *

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

(Filed Sept. 1, 1943.)

Plaintiff-appellant, pursuant to Rule 75(a) of the Rules of Civil Procedure for the District Courts of the United States, now designates the following portions of the record and proceedings in the above entitled cause which shall be contained in the Record on Appeal:

1. Bill of Complaint.
2. All appearances for defendants.
3. Answers of Defendants.
4. Amendment of and supplement to complaint.
5. Answer to amendment of complaint.
6. Answer to supplemental complaint.
7. Finding of Facts.
8. Conclusions of law.
9. Final judgment entered June 30, 1943.
10. All order book entries in said cause not enumerated herein.
11. Notice of appeal.

12. Appeal bond.
13. This designation of parts of the record.
14. Plaintiff's statement of points to be relied upon.
15. Clerk's Certificate to Transcript of Record.

/s/ Ross McCord Ice & Miller,
/s/ Jas. A. Ross,
Attorneys for Plaintiff-Appellant,
Ford Motor Company.

951 Consolidated Building,
Indianapolis, Indiana.

Receipt of service of a copy of the foregoing Designation of portions of the Record upon defendants-appellees is acknowledged this 1st day of September, 1943.

/c/ John J. McShane,
/s/ Winslow Van Horne,
Attorneys for Defendants-Appellees.

128 United States of America
Southern District of Indiana
Indianapolis Division

I, Albert C. Sogemeier, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that the above and foregoing is a true and full transcript of the record and proceedings in the cause of Ford Motor Company *vs.* Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and constituting the Department of Treasury of the State of Indiana, No. 117 Civil, according to the Designation filed September 1, 1943, now remaining among the records of said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Indianapolis, this 18th day of September, 1943.

Albert C. Sogemeier,
(Seal) *Clerk, United States District Court*
Southern District of Indiana.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed record, printed under my supervision and filed on the third day of November, 1943, in:

Cause No. 8417.

Ford Motor Company,
Plaintiff-Appellant,

vs.

Department of Treasury of the State of Indiana, etc.,
Defendants-Appellees,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 5th day of April, A. D. 1944.

Kenneth J. Carrick
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the sixth day of October, in the year of our Lord one thousand nine hundred and forty-two, and of our Independence, the one hundred and sixty-seventh.

8417

Ford Motor Company,
Plaintiff-Appellant,
vs.
Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and Constituting the Department of Treasury of the State of Indiana,
Defendants-Appellees.

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis, Division.

And, to-wit: On the twenty-fifth day of September, 1943, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 8417.

Ford Motor Company,
Plaintiff-Appellant,

vs.

Department of Treasury of the State of Indiana, *et al.*, etc.,
Defendants-Appellees.

The Clerk will enter our appearance as counsel for Plaintiff-Appellant.

James A. Ross,
950 Consolidated Bldg.,
Indianapolis, Ind.
Robt. D. McCord,
950 Consolidated Bldg.,
Indianapolis, Ind.

Endorsed: Filed September 25, 1943. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the twenty-fifth day of September, 1943, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellees, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 8417.

Ford Motor Company,
Plaintiff-Appellant.

vs.

Department of Treasury of the State of Indiana, *et al.*, etc.,
Defendants-Appellees.

The Clerk will enter our appearance as counsel for Defendants-Appellees.

Winslow Van Horne,
141 S. Meridian St.,
Indianapolis, Ind.
John J. McShane,
141 S. Meridian St.,
Indianapolis, Ind.
James A. Emmert,
State House,
Indianapolis, Indiana.

Endorsed: Filed September 25, 1943. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the eleventh day of January, 1944, the following further proceedings were had and entered of record, to-wit:

Tuesday, January 11, 1944.

Court met pursuant to adjournment.

Before:

Hon. Otto Kerner, Circuit Judge.
Hon. Sherman Minton, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

8417	Ford Motor Company, *Plaintiff-Appellant*, *vs.* Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and Constituting the Department of Treasury of the State of Indiana, *Defendants-Appellees.*	Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis, Division.

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of the record and the briefs of counsel, and on oral argument by Mr. James A. Ross, counsel for appellant, and by Mr. Winslow Van Horne and Mr. John J. McShane, Counsel for appellees, and the Court takes this matter under advisement.

And afterwards, to-wit: On the fourth day of March, 1944, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 8417. **October Term, 1943, January Session, 1944.**

FORD MOTOR COMPANY,
Plaintiff-Appellant,
vs.
DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON and FRANK G. THOMPSON, As and Constituting the Department of Treasury of the State of Indiana,
Defendants-Appellees.

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

March 4, 1944.

Before KERNER and MINTON, *Circuit Judges,* and LINDLEY, *District Judge.*

MINTON, *Circuit Judge.* Only one question is presented here: Whether the plaintiff-appellant, the Ford Motor Company, a non-resident of Indiana, must pay to the State of Indiana a tax on its gross income from a certain type of transaction designated in the record as "Class A sales." The years in question are 1935, 1936, and 1937.

The plaintiff paid the tax and brought suit in the District Court to recover against the defendants-appellees, the Department of Treasury of the State of Indiana and the officials constituting the Board of that Department. The District Court made findings of fact and stated its conclusions of law thereon in favor of the defendants. From a judgment in favor of the defendants, the plaintiff has appealed.

The plaintiff, as stated in its brief, relied solely upon errors arising out of the court's conclusions of law. The evidence is not before us. The record consists only of pleadings, findings of fact, which are unchallenged, and conclusions of law.

For a description of Class A sales, we look to Finding No. Ten:

"The major cause of the additional assessment asserted by the department was due to the imposition of a tax upon gross receipts by plaintiff from sales where cars, trucks or parts were shipped directly from the plaintiff's factory at Dearborn, or from plaintiff's assembly plants at Chicago, Cincinnati, and Louisville, to dealers in Indiana who were assigned to such branches, and (1) where such products were paid for by such Indiana dealers in cash upon the delivery thereof at such dealers' place of business in Indiana, such payments having been made by such dealers to the employees of the truck-away or convoy companies upon delivery, and (2) where such products were paid for by such Indiana dealers with finance papers, or a combination of finance papers, and cash, upon delivery thereof at the dealers' place of business in Indiana, such payments having been made by such dealers to the employees of the truck-away or convoy companies upon making such delivery, and in both instances the collections so received by the truck-away or convoy companies were by them taken and delivered in due course to the respective branches of the plaintiff aforesaid entitled to receive the same, were deposited by such branches in their regular depository as hereinbefore found, and were thereupon subject to the further order and disposition by the plaintiff as its property; these may be properly referred to as 'Class A' sales."

The District Court made further relevant findings concerning the nature of Class A sales in Finding No. Seventeen:

"• • •

"(b) All of the gross receipts from the sale of cars, trucks and parts by plaintiff to dealers in Indiana, upon which the taxes and interest were assessed and collected as shown in Finding No. Sixteen,[1] were received by plaintiff while it was engaged in business in Indiana, and derived from sources within Indiana, from the sale and transfer of plaintiff's property which was thus transported to its Indiana dealers as aforesaid,

1. Finding No. Sixteen covered Class A sales and another class not involved here.

and paid for by such Indiana dealers in cash upon arrival at their places of business in Indiana, or were paid for upon arrival at the place of business of such dealers in Indiana with finance papers executed as aforesaid, or a combination of cash and finance papers, collection having been made in both instances by the employees of said truck-away or convoy companies acting as the agent for the plaintiff in the making of such collections, and who, thereafter, in due course transmitted such receipts and collections to the respective branches of plaintiff entitled to receive the same."

From these findings, it is clear that Class A sales were sales of merchandise manufactured and assembled outside of Indiana but that every transaction in the sales, with the exception of the shipment of the goods and the receipt of some orders, took place in Indiana.

As the Gross Income Tax Law of Indiana was originally enacted in 1933, Chapter 50, Acts of 1933, Burns Indiana Revised Statutes Annotated (1933) § 64-2602, it provided:

"Sec. 2. * * * Such tax shall be levied upon the entire gross income of all residents of the state of Indiana, and upon the gross income derived from sources within the state of Indiana, of all persons and/or companies, including banks, who are not residents of the state of Indiana, but are engaged in business in this state or who derive gross income from sources within this state * * *."

This statute was limited by the holding of the Supreme Court in *J. D. Adams Manufacturing Company* v. *Storen*, 304 U. S. 307, 58 S. Ct. 913, 83 L. Ed. 1365, so as to exclude from its scope sales made outside the State by a domestic corporation of Indiana, although the goods were manufactured in Indiana and shipped therefrom. In accordance with this holding, the Gross Income Tax Law was amended in 1937, Chapter 117, Acts of 1937, Burns Indiana Revised Statutes Annotated (1943) § 64-2602, to read:

"Sec. 2. * * * Such tax shall be levied upon the receipt of the entire gross income of all persons resident and/or domiciled in the State of Indiana, except as herein otherwise provided; and upon the receipt of gross income derived from activities or businesses or any other source within the state of Indiana, of all persons who are not residents of the state of Indiana * * *."

It is conceded by the plaintiff, however, that this amendment does not help its case. It is quite apparent that the District Court intended to find and did find the facts which brought Class A sales squarely within both the provisions of the Act of 1933 and the amended provision of 1937.

The plaintiff relies upon *Department of Treasury* v. *International Harvester Co.*, 47 N. E. 2d 150, 152. In that case, the Indiana Supreme Court said:

> "• • • Under Class A the orders upon which the goods were sold were accepted outside the confines of Indiana, and payment was made to branches in other states. There was no showing of a tax evasion. We cannot say that income so received by the appellees was 'derived from sources within the state of Indiana.'"

Thus it will be seen that in that case the articles were accepted and paid for outside of Indiana, while in the case at bar they were accepted and paid for in Indiana. In one case, we have a sale within Indiana, which is covered by the statute, and in the other, a sale without Indiana not covered by the statute.

The plaintiff also insists that the tax in the case at bar is a burden upon interstate commerce and therefore invalid, citing *J. D. Adams Manufacturing Co.* v. *Storen, supra.* In that case, as we have said, the State of Indiana sought to tax the gross receipts of a domestic corporation which were derived from the sale of goods manufactured within the State but sold outside the State. The Supreme Court held that the tax was a burden upon interstate commerce and invalid. That is not the case we have before us. Since the gross income here involved was derived from sales in which all transactions except the placing of some orders and the shipment of the goods took place in Indiana, the sales occurred in Indiana and such transactions were so isolated in and identified with Indiana that the possibility of multiple taxation of such sales was eliminated. That being so, the fact that the merchandise arrived in Indiana in interstate commerce is immaterial. *Department of Treasury* v. *Allied Mills*, 220 Ind. 340, 42 N. E. 2d 34; *J. D. Adams Manufacturing Co.* v. *Storen, supra; Department of Treasury of Indiana* v. *Wood Preserving Corp.*, 313 U. S. 62, 61 S. Ct. 885, 85 L. Ed. 1188; *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 57, 60 S. Ct. 388, 84 L. Ed. 565.

It is not controlling that the gross income taxed is de-

rived from the sale of goods that arrive in the State in interstate commerce. If the tax does not burden interstate commerce, it is not invalid, and it does not burden interstate commerce when the gross receipts are derived from sales that took place within the taxing state. That is this case.

The plaintiff had made its claim for refund with the Gross Income Tax Division of the Department of Treasury of Indiana. The Division had within it one designated as hearing judge, who rendered to the Division opinions on applications for refund. In the case at bar, the hearing judge first ruled the refund was not proper. Later he ruled that it was proper and that refund should be made, and the plaintiff was so advised. However, the hearing judge's later ruling was not approved by the Department, and the case in the District Court proceeded to trial. The plaintiff amended its pleadings and alleged that the ruling of the hearing judge and its communication to the plaintiff amounted to an account stated.

As to this, the District Court found:

"Finding No. Fifteen.

"At no time did defendant or any of its attorneys, agents or employees promise plaintiff that the sum of $78.514.10, or any other specifically stated amount would be refunded to plaintiff. No certificate of overassessment was issued to plaintiff by defendant at any time."

In order to have an account stated, the party who states the account must be authorized to do so, and the account stated must be for a definite, certain amount. *American Jurisprudence*, Vol. 1, Accounts and Accounting, §§ 23-24. There is no finding in the case at bar that the so-called hearing judge in the Gross Income Tax Division was authorized to bind the State of Indiana or that his ruling was final. Evidently it was not final, as it was not followed by the Department. We have found no authority in the statutes of Indiana that statements of such a hearing judge bind the State of Indiana. It follows, therefore, that no one who was authorized to do so stated an account and that furthermore the alleged account stated was not found to be for any specific amount. Therefore, the State of Indiana is not liable on the theory of an account stated.

The judgment is

AFFIRMED.

LINDLEY, *D. J.*, Dissenting:

I am sorry to say that after mature consideration, I find it impossible to distinguish the facts here from those in *Department of Treasury* v. *International Harvester Company*, 47 N. E. (2d) 150 (Ind.). In view of that decision, I think the judgment should be reversed.

Endorsed: Filed March 4, 1944. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the fourth day of March, 1944, the following further proceedings were had and entered of record, to-wit:

Saturday, March 4, 1944.

Court met pursuant to adjournment.

Before:

Hon. Otto Kerner, Circuit Judge.
Hon. Sherman Minton, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

8417

Ford Motor Company, *Plaintiff-Appellant*, *vs.* Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and Constituting the Department of Treasury of the State of Indiana, *Defendants-Appellees.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in

this cause appealed from be, and the same is hereby, affirmed, with costs.

And afterwards, to-wit: On the twenty-seventh day of March, 1944, the Mandate of this Court issued to the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the proceedings had and papers filed, excepting briefs of counsel and motions and orders extending time for filing briefs, in:

Cause No. 8417.

Ford Motor Company,
Plaintiff-Appellant,

vs.

Department of Treasury of the State of Indiana, etc.,
Defendants-Appellees,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 5th day of April, A. D. 1944.

Kenneth J. Carrick
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 29, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.